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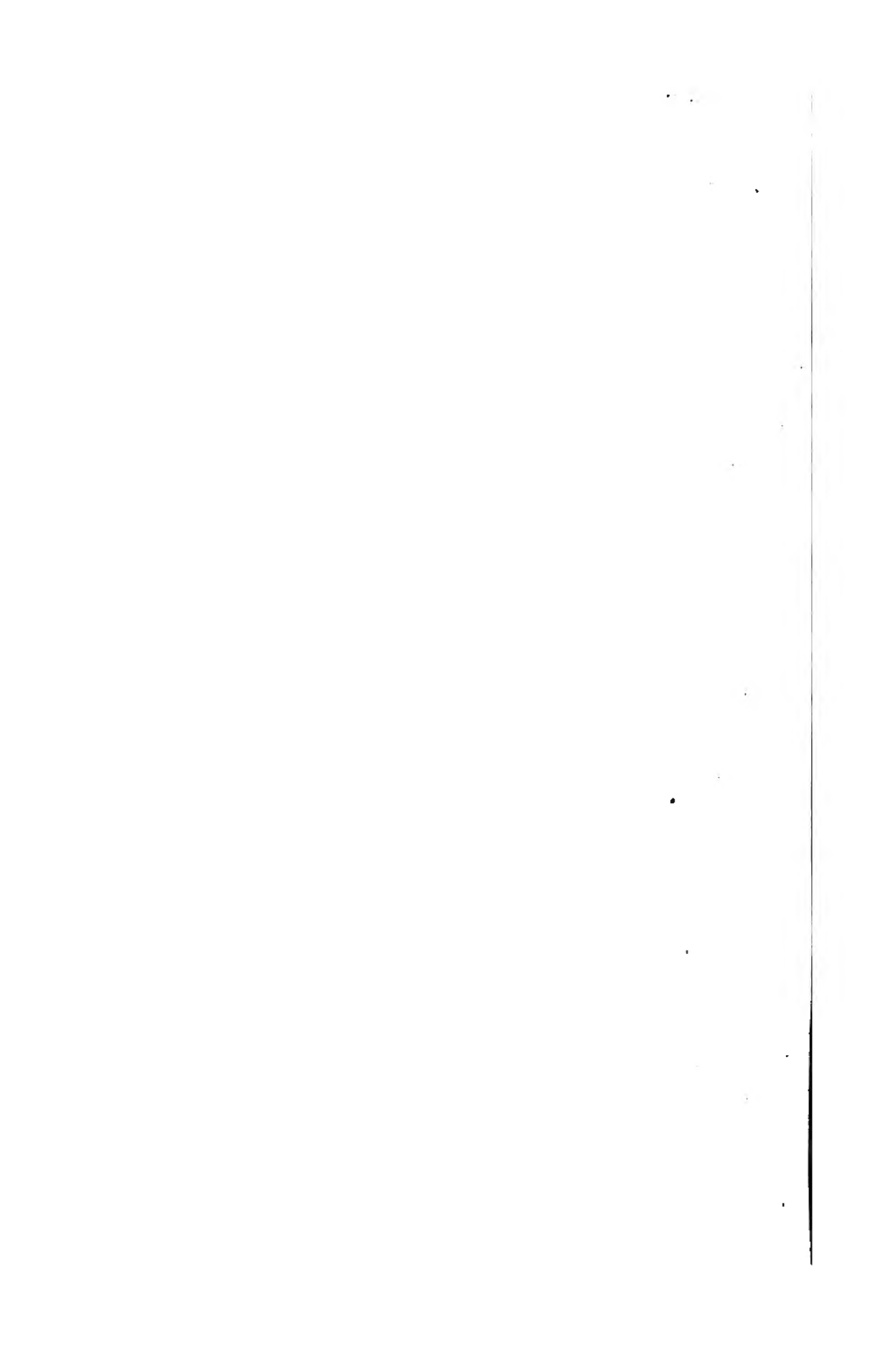
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J. O. Harte

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A TREATISE
ON THE
LAW OF EXECUTORS
AND
ADMINISTRATORS.

BY
JAMES SCHOULER,
AUTHOR OF TREATISES ON "THE LAW OF THE DOMESTIC RELATIONS,"
"THE LAW OF PERSONAL PROPERTY," ETC.

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WILLIAM SCHOULER

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PREFACE.

THE present work completes an investigation of the law of Personal Property, whose results the writer commenced publishing ten years ago; an investigation pursued far beyond the limits originally proposed, but not without direct encouragement from his professional brethren.

Four volumes properly comprehend the main subject, as follows:

1. The Nature, General Incidents, and Leading Classes of Personal Property. SCHOULER ON PERSONAL PROPERTY, Vol. I.
2. Title to Personal Property by Original Acquisition, Gift and Sale. SCHOULER ON PERSONAL PROPERTY, Vol. II.; or, as it might well be styled, SCHOULER ON GIFTS AND SALES.
3. Title to Personal Property by Bailment. SCHOULER ON BAILMENTS, INCLUDING CARRIERS, INNKEEPERS AND PLEDGE.
4. Title to Personal Property by Death. SCHOULER ON EXECUTORS AND ADMINISTRATORS.

Elementary writers discourse further of Title to Personal Property by Judgment and Insolvency; but the law pertaining to these subjects is greatly controlled at this day by statutes of local application, and, besides, may be found amply discussed in text-books already familiar to the practitioner.

A practical experience in the special branch of law which pertains to executors and administrators has been found serviceable to the writer in preparing the present volume. The latest published reports, English and American, to the close of the year 1882, have been personally consulted by him, and cited so far as seemed desirable. The American decisions, reported in the United States Digest, have been carefully studied. Whatever other assistance has been received, from text-books, and especially from the elaborate English work of Williams, on this subject, is duly acknowledged in the foot-notes. Without instituting comparisons with other text-writers on this important branch of the law, the author may fairly claim, as he submits, that no work of a single volume is already before the professional public, presenting historically and logically the whole English and American law of executors and administrators, with a due regard for the modern practical needs of such fiduciaries and their legal advisers, separating the main subject from those more abstruse topics which pertain to Wills and Testamentary Trusts, and giving to the excellent points of our American probate practice of this day the prominence justly deserved. He trusts, therefore, that the present work will be found to supply an actual want, in a genuine sense.

JAMES SCHOULER.

BOSTON, March 31, 1883.

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THE LAW
OF
EXECUTORS AND ADMINISTRATORS.

PART I.

INTRODUCTORY CHAPTER.

§ 1. **Estates of Deceased Persons; how Settled in Modern Practice; Theory of Judicial Supervision.** — When a person dies, leaving a fair amount of personal property, his estate is usually set apart, in our modern English and American practice, to be settled under the immediate supervision of local and usually county tribunals invested with appropriate functions, whose fundamental duty it is to exact a settlement according to law ; and, moreover, with due respect to the last wishes of the deceased, if such wishes were properly expressed by him during his lifetime while of sound and disposing mind.

The main objects proposed are these : that the personalty of the deceased be properly collected, preserved, and (together with income and profits) duly accounted for ; that his just debts and the charges consequent upon his death and the administration of his estate be paid and adjusted, with such discrimination only as the law recognizes in case the assets should prove insufficient ; that the immediate necessities of spouse and young children (if there be such surviving) be provided for as the statute may have directed ; that the distribution and division of the residue or surplus of the estate be made among such persons and in such proportions as the will of the deceased, if there be one, otherwise the statute of distribution may have prescribed. Where the deceased left what purports to be a will, the solemn establishment of that will and its public authentication require further attention from such tribunals ; specific or general legacies must be paid

next after the debts, taking their peculiar priorities, and the balance or residuary fund reckoned up and adjusted accordingly, if not already exhausted.

Whether a last will, entitled to probate, be left or not, the management of the estate must be judicially committed to the person or persons rightfully entitled to represent the deceased; he or they qualifying, by giving bond with or without security, as the case may be, for a faithful performance of the trust, and thereupon receiving letters under the seal and authentication of the court. And this by way of public credentials or a commission, to be respected in all other courts throughout the jurisdiction of the State or country. All this judicial supervision and direction is exercised, in England and the United States, by peculiar tribunals, whose jurisdiction and powers are in modern times usually defined, if not created, by local statutes. But chancery courts in England have a supervision besides.

§ 2. **Settlement of Estates, Testate or Intestate; Executors and Administrators, and their Functions; Administration.** — The estates of deceased persons, it is thus perceived, are well classified as *testate* and *intestate*: the one class embracing all estates to be settled under a will; the other, all estates for settlement where there was no will. In many respects, such as the collection and preservation of effects, and the payment of debts and charges, there is little or no essential difference found in our modern practice between these two classes. For it is a fundamental maxim of our common law that all just existing debts shall be paid out of one's property before any further disposition thereof can take effect.¹ But great differences are perceived when it comes to that further disposition of the dead person's property; a testate estate being divided and distributed according to the testamentary directions of the deceased, while that of an intestate goes by the public mandate. The representative follows a private plan and specifications in the one case, but not in the other, so far as he deals with the surplus above debts and charges.

This representative under a will, so peculiarly intimate in his relation with the thoughts and wishes of the deceased, is

¹ Coke, 2d Inst. 398; Bouv. Dict. "Administration."

styled an *executor* in the former instance ; an executor being the person who is charged by the testator with the execution or putting in force of his will.¹ The corresponding representative, for other cases, is an *administrator* ; this term applying, not only where the deceased person left no valid will at all, but where the estate is testate, and yet, for one reason or another, there is no person found to execute the will whom the testator may be said to have actually designated or selected for the office.² And hence arises some confusion in legal terms when we seek to distinguish between the representatives of testate and of intestate estates ; though the words *executors* and *administrators* are commonly employed in that connection as if correlative.

The common-law distinction is, in fact, here founded in considerations of privilege attached to the personal choice by the deceased of his own representative, — considerations which in the lapse of time have lost much of their early force. The executor was said, by English jurists, to derive his authority from the will, rather than from any judicial appointment at all ; and hence his formal qualification for the office was deemed of secondary consequence ; the English temporal courts showing no great solicitude for upholding that peculiar authority over decedents' estates which spiritual tribunals asserted. On the other hand, it was admitted that an administrator's authority was derived wholly from the appointment made by such tribunals, though this appointment were in literal pursuance of the statute.³ The modern tendency, however, both in England and the United States, is to assimilate the powers and duties of these two classes of legal representatives so far as may be ; to recognize the departure of their several functions only so far as the distinction between settling estates testate and intestate fairly produces it ; to require both executors and administrators to take out letters and qualify in the same special court, rendering their accounts upon a like plan and subject to a like supervision ; and to rule that the choice of an executor by the testator

¹ 2 Bl. Com. 503; 3 Atk. Ch. 301.

² 2 Bl. Com. 494.

³ See 2 Bl. Com. 495; Part II., *post*, as to appointment.

gives the one a marked advantage for securing the judicial appointment in preference to others desiring the office, and upon peculiarly favorable terms, perhaps, as to furnishing security, but not so as to override or dispense with the judicial discretion altogether.

Nevertheless, *executors* and *administrators* are technically distinguished in our law as before. One selected judicially to settle an estate under a will, not being named in that will, is styled an *administrator* (not *executor*), with the will annexed; and there is no *executor*, so to speak, apart from some designation under the will of the person who shall officiate in the trust. Consequently, "execution" being a term quite liable to legal misconception, and in probate law confined at all events to the narrower connection, the word "administration" is at the present day acquiring a broad signification, as more nearly synonymous with the general management and settlement of a deceased person's estate.¹ For, as a jurisprudence develops, which takes in the whole compass of our highly interesting and important subject, the necessity becomes felt for a single appropriate and universal term, applicable to estates whether testate or intestate, and to the winding-up of a dead owner's affairs under spiritual or probate supervision; and such a term the common law does not supply.

§ 3. **Whether there may be a Will without an Executor.** — The logical distinction between executors and administrators appears to have been more precisely stated in the ancient days of our law than in modern times. For, to quote from Swinburne, "the naming or appointment of an executor is said to be the foundation, the substance, the head, and is indeed the true formal cause of the testament, without which a will is no proper testament, and by the which only the will is made a testament."² And other early English authorities are to the same purport.³ Nevertheless, our modern practice proceeds

¹ See e.g. Bouv. Dict. "Administration." Some digests of the present day are arranged with reference to such a heading; though the more common title

is still like that of the present volume, "Executors and Administrators."

² Swinb. pt. 1, § 3, pl. 19.

³ Godolphin, pt. 1, c. 1, § 2; Plowd. 185; Wms. Exrs. 7.

upon quite a different theory ; and while there can be no executor without some will to name or constitute him, it is certain that a will properly executed may be valid without naming an executor at all, or notwithstanding the executor named dies before probate or from one cause or another becomes disqualified from acting ; in any of which contingencies the probate court will constitute an administrator with the will annexed.¹

§ 4. **Devise and Bequest or Legacy distinguished ; whether a Will can operate upon Property afterwards acquired.** — In its literal and technical import the word *devise* refers only to real estate ; whereas a *bequest* is a gift by will of personal property. Under a will, to devise is to give real estate to another ; and to bequeath is to give personal property to another.² The term *legacy*, too, which is a gift by last will, applies more familiarly (as the history of wills at English law indicates) to personal property, or to money, goods, and chattels, although sometimes employed with further reference to a charge upon real estate.³ In fact, a devise of lands, when such dispositions became permitted, was seen to be distinguishable in its operation from a will or testament ; for a will or testament operated in general terms upon all the personal property of which the testator might die possessed, save so far as he chose to except particular chattels ; whereas a devise of lands was treated in the courts rather as a conveyance by way of appointment of particular lands to a particular devisee.⁴ Upon such a principle of distinction it became established in practice that one could devise only lands of which he was seized at the time of its execution ; whereas his will and testament would operate of right upon personal property before or afterwards acquired, provided only that he died possessed of it.⁵

¹ See 2 Chanc. Rep. 112; Appointment, *post*, Part II. Even under the old law, an instrument which would have been a testament had an executor been named, was considered obligatory upon the administrator, under the appellation of "codicil." Wms. Exrs. 7.

² Bouv. Dict. "Devise," "Bequest," etc.

³ Bouv. Dict. "Legacy." And see *post* as to the payment of legacies.

⁴ Harwood v. Goodright, Cowp. 90; 4 Kent Com. 502; Wms. Exrs. 6, 7.

⁵ Wind v. Jekyl, 1 P. Wms. 575; Wms. Exrs. 6, 7.

The modern extension of testamentary facilities to the disposition of a testator's whole estate, whether real, personal, or mixed, tends, however, to subvert distinctions of this latter description. In the United States, wills are usually permitted to operate upon real estate and descendible interests of every description; and local statutes expressly recognize the right of a testator to pass his after-acquired lands and landed estates and interests, giving effect to his manifest intention accordingly. Manifest intention is the rule of guidance correspondingly as to all dispositions of personalty, though presumptions as to that intention may differ; and hence "will and testament" have long been the words popularly used in this country¹ as applicable to one's property of whatever description which he disposes of with testamentary intention. In England, too, "devise," since the year 1837, has lost much of its special significance; for the statute of wills, 1 Vict. c. 26, extends the power of disposing by one's will duly executed to all such real and personal estate (including landed interests) as the testator may be entitled to at the time of his death, notwithstanding his title vests subsequently to the execution of his will.²

§ 5. Personal Property is administered; whether Real Estate can be applied. — The management, settlement, or administration of the estates of deceased persons relates primarily and fundamentally to personal property alone; for with the real estate of the testate or intestate decedent, his executor or administrator has at common law no concern.³ This rule is owing partly perhaps to the jealousy with which bishops and their tribunals of special jurisdiction over estates of the dead were formerly regarded; but we should chiefly ascribe it to that stability of real estate tenure as contrasted with title to personal property, which is at the basis of English policy and English jurisprudence. An ancestor's lands vested in his

¹ Chancellor Kent observed this popular use of words in the United States early in the present century. See 4 Kent Com. 501. And see Wms. Exrs. 6, 7, Perkins's *n.*

² See Stat. 1 Vict. c. 26, § 3; Wms. Exrs. preface.

³ This subject is considered at length, *post.*

descendant at his decease without further formality; the heir-at-law became invested with the dignities and responsibilities pertaining to the founder; in England a statute of descents was not framed like a statute of distributions. "By the laws of this realm," observes Swinburne, one of our earliest writers of repute on testamentary law, "as the heir hath not to deal with the goods and chattels of the deceased, no more hath the executor to do with the lands, tenements, and hereditaments";¹ and if the executor as such, notwithstanding the confidence reposed in him, took no interest in the real estate of his testator, still less did an administrator in the lands of an intestate. Debt and charges, nevertheless, remain obligatory upon the estate, so long as property of the deceased may be found for their satisfaction; and hence, if the personal assets prove insufficient, the lands may be applied to make up the deficiency on license of the court; modern statutes in England and the United States greatly enlarging all earlier facilities in this respect. Moreover, an executor may have been empowered in fact to deal with real estate under the will of his testator; who on his part naturally does not bestow the bulk of his fortune upon those surviving him in these days without contemplating a general disposition of his property, real, personal, and mixed.

A schedule of real estate of the deceased is therefore to be included in the inventory which an executor or administrator returns to the court from whose appointment he derives full authority; the schedule of personal property, however, serving alone as the basis of his accounts.² And while such real estate, in the absence of a will making inconsistent provisions, may still as formerly be said to vest in the heir at once, upon the owner's decease, an incumbrance or cloud remains on the title until a sufficient period has elapsed for presenting claims against the estate or it otherwise appears clear that the personal representative will not be compelled to resort to the land because the personal assets prove deficient for the purposes of winding up the estate.³

¹ Swinb. pt. 6, § 3, pl. 5.

² This subject will be considered at

³ See as to Inventory and Assets, *post.* length, *post.*

§ 6. **Succession in the Civil Law; as distinguished from Administration.** — Our common law system of “administration” (using this word in its broadest sense¹) whereby a deceased person’s estate becomes sequestered, so to speak, and confided to legal representatives for the purposes we have described, appears to have no precise counterpart in Roman jurisprudence. “Succession” is a general term used by civilians with reference to the right and transmission of the rights and obligations of a deceased person; but “title by succession” is very different from that representative or trust title to personalty which one takes at our law as an executor or administrator; being indeed so complex and abstruse a topic as hardly to deserve our studious attention. The heir stepped into the place vacated by the deceased, enjoying his property rights, and burdened with his property responsibilities; this was the fundamental principle of succession, the successor himself being called at Roman law *haeres*, and that to which he succeeded *haereditas*. Upon such heir (whose *status* was somewhat like that of our common-law heir to whom real estate descends, when the ancestor has left no other property) devolved at Roman law the personal duty of discharging legal debts and incumbrances of the deceased; and, moreover, if the deceased left a will, of satisfying the special testamentary provisions in addition. In this latter respect, it appears that the heir was bound to pay all legacies so far as the property descending to him might suffice, and no farther; but as to the former, legal consistency for the space of a thousand years in Roman history compelled the successor to pay all the debts of his deceased predecessor, whether the property obtained from the estate proved sufficient or not; a harsh but legitimate consequence of the theory, which disappeared in the age of Justinian, at which era inventories were introduced in order that the estates of heir and decedent might be separated.² Religious scruples had all the while prompted the successor of an insolvent to make personal sacrifice; for religious and temporal duties

¹ *Supra*, § 2.

² Hunter’s Roman Law, 567, 568. In a few instances prior to Justinian the Prætor allowed a *separatio bonorum*. *Ib.*

were blended in the succession; and the estate of the deceased who died insolvent was stigmatized as *damnosa*. The heir enjoyed of course the usual privileges of a residuary legatee; and after the changes introduced by Justinian, two classes of heirs were found to have sprung up in Roman practice: the one consisting of those who made no inventory, and bore the ancient burdens of a legal succession; the other, of those who made an inventory, and left the decedent's estate to be honored or dishonored upon its own merits, and required creditors to confine their claims to assets available from the estate, not contributing their own private fortunes to make up a deficiency.¹

Thus was the old theory of succession gradually forsaken in the latter days of the Roman empire, the heir becoming more nearly in effect like what we style an executor or administrator, if so he preferred. It is to be presumed that the person who was instituted heir might renounce the succession if he chose, and thus escape all burdensome obligations. And in default of a *testamentary succession*,—that is, the constitution of the heir by a will duly executed in the forms prescribed by law,—or where he renounced the inheritance, a *legal succession* arose in favor of the nearest relatives of the deceased; moreover, an *irregular succession* became established by law in favor of certain persons or of the State in default of heirs either legal or instituted by testament. Such doctrines certainly pertain to the civil law of modern Europe and of American colonies founded by the French and Spanish.²

“Administration” and “administrators” are terms not employed, however, by either the ancient or modern civilians, as it would appear, though our “administration” somewhat resembles the *bonorum possessio* of imperial Rome.³ But, as concerns the settlement of testate estates, while the Roman testator seldom committed such functions to other persons than the testamentary heir himself, and similar restraints are

¹ Hunter's Roman Law, 567, 568, 574-576.

² Domat. Civ. Law by Strahan, § 3125; Bouv. Dict. “Succession.”

³ Colquhoun's Rom. Civ. Law, § 1413.

still practised in some European localities, modern custom in France greatly favors the special institution of executors, and leaves the testator at liberty to name persons who shall take all or part of the movable property for executing the dispositions under the will confided to their care.¹ And thus may one's testamentary dispositions take effect and be fully executed, notwithstanding the absence, death, or possible misconduct of the testamentary heir, and this by means of representatives whose judgment, integrity, and business qualifications may be weighed without the prepossessions of family affection. For freedom in the selection of executors under a will is the surest pledge of faithful execution of that will according to the interests of all concerned under its provisions.

§ 7. Testacy preferred to Intestacy in Civil and Common Law; Former Abuses in English Law where Intestate Estates were administered.— Under both the civil and common law traditions, as it thus appears, a person of fortune has been expected to dispose of his personal estate by a will; and tracing either law to its source, we shall find testacy in that respect decidedly preferred to intestacy. Indeed, the contempt of our early English law for those who from want of foresight or opportunity died leaving behind them personal property not bequeathed by some last will and testament in a formal manner was strikingly manifested. The intestate came into the category of bastards and other unfortunates. The king, according to the old maxims, might seize upon his goods and chattels as *parens patriae*; and for a considerable time the feudal superior or lord of a demesne exercised by delegation the right of administration; after which this branch of the prerogative passed to the bishop or ordinary in the several dioceses upon a trust to distribute the residue of the intestate's goods in charity to the poor or for what were deemed pious uses. These prelates soon abused a trust for which they

¹ Domat. Civ. Law, §§ 3330–3334. In early colonial days, when the civil law, as modified by the usages of Holland, prevailed in New York, the execution of a will devolved upon the “intestate heir” without issuance of any letters whatever. *Van Giesen v. Bridgford*, 18 Hun (N.Y.) 73.

were held accountable in truth only to God and their spiritual superiors; they would take to themselves, in their several jurisdictions the whole surplus of an intestate's estate after deducting the *partes rationabiles*; that is to say, two-thirds to which one's wife and children (if he left such) were entitled, and this without even paying his just debts and lawful charges. That iniquitous rule Pope Innocent IV. recognized as the established common law of Great Britain as early as the middle of the thirteenth century.¹

Two acts of Parliament put an end to this abuse of spiritual power: (1) the Statute of Westm. II. (declaratory of the common law), which required the ordinary to pay the debts of the intestate so far as his goods extended, in the same manner that executors were bound to do where one died testate; (2) the Statute 31 Edw. III. c. 11, under whose later provisions the ordinary ceased to be a sort of *haeres* under an intestate succession, and became obliged to depute administration to the nearest and most lawful friends of the deceased, instead of administering as before in person and without accountability.² These statutes went far towards altering former hardships and bringing executors and administrators upon an equivalent footing of legal accountability to all those interested in the estate; though abuses continued as to surpluses, for which the temporal administrator in his turn deserved reproach, the ecclesiastical courts having endeavored in vain to force a proper distribution of intestate estates by taking bonds from these legal representatives to that intent. At length was enacted the Statute of Distributions, 22 & 23 Car. II. c. 10, and the administrator of an intestate estate could no longer administer for his personal benefit.³ The first American colonies were planted before the date of this last important enactment of the English Parliament; but positive enactments of a similiar character have long prevailed in every State of this Union.⁴

¹ 2 Bl. Com. 495, 496.

² Wms. Exrs. 1484.

³ 2 Bl. Com. 495, 496; Wms. Exrs. 7th Eng. ed. 401; Snelling's Case, 5 Rep. 82 b.

⁴ See *post* as to Distribution.

§ 8. **Wills of Real and Personal Property, whether distinguishable of Right; Modern Statute of Wills.** — From the time of the Norman Conquest until the reign of Henry VIII. an English subject had strictly speaking no right to dispose by will of his real estate; but the land would descend to the heir by force of the law of descents which favored a first-born son above all other children. It was constantly admitted, however, that wills of chattels or personal property might be made; and the term “chattels,” of course, embraced terms for years and other chattels real, which, being of less dignity than a freehold, followed necessarily the same general doctrines as chattels personal.¹ But the acts 32 & 34 Henry VIII. sanctioned to a considerable extent the devise of lands, upon the testator’s observance of certain formalities which were further set out by the celebrated Statute of Frauds (29 Car. II.).

In the United States primogeniture was early abolished with all its attendant privileges; and our ancestors, from the earliest colonial establishment, appear to have permitted the devise of lands by will under statute regulations based upon these English enactments.² Since our independence of Great Britain, American policy has favored, in the several States, the execution of wills with the same formalities, whether to pass real or personal property, or both kinds together. This same just doctrine has at length gained a firm footing in England by operation of the important modern Statute of Wills, 1 Vict. c. 26 (which affects all English wills made from and after January 1, 1838); under whose provisions it is rendered lawful for every person to devise, bequeath, and dispose of all real estate and all personal estate which he shall be entitled to at the time of his death, either at law or in equity, provided the will be executed with the formalities therein prescribed.³

¹ Wms. Exrs. 1; Co. Litt. 111 b, note (1) by Hargrave.

² 4 Kent Com. 504, 505; Part II., *post*.

³ Wms. Exrs. 7th ed. 5. This Stat. (1 Vict. c. 26) is set forth at length in the preface to the 6th and later editions of Williams’s work. See *post* as to the appointment of executors.

§ 9. **Ancient Doctrine of the Reasonable Parts of Widow and Children; Wills of Personal Property affected.** — But while the common law permitted one to bequeath his personal property by will, a restriction appears to have prevailed in the reign of Henry II. as to the person who died leaving a wife or issue or both surviving him. In such a case the man's goods and chattels, if he left both wife and children, were divided into three equal parts: one went to his heirs or lineal descendants, another to his wife, and only the remaining third went according to his own express disposition; though, if only a wife survived him, or only issue, a moiety went to such wife or such issue, and he might bequeath the other moiety. These shares of wife or children were called their reasonable parts, and the writ *de rationabili parte bonorum* lay for the recovery of these portions. If, however, the testator died, leaving neither widow nor issue, his will might operate so as to dispose absolutely of all his personalty; and the legal restriction itself whether of general force, or existing only in certain localities by custom, gradually disappeared, the date of its extinction as well as its origin being obscure.¹

§ 10. **Jurisdiction in the Grant of Letters Testamentary and Administration; English Ecclesiastical Courts.** — Jurisdiction over wills and their probate in England belonged, before ecclesiastical functions were exercised in such cases, to the county court or to the court baron of the manor where the testator died; and before these county tribunals all other matters of civil dispute were determined. This power of the probate existed down to a quite recent period in certain English manors, and so as to preclude the interference of the ordinary. The earl formerly presided over this county court; but after the introduction of Christianity the bishop sat with the earl. Soon after the Norman invasion, however, the ecclesiastical and temporal jurisdictions were separated; and gradually the bishops became invested with plenary author-

¹ Wms. Exrs. 2, 3; Co. Litt. 176 b; given by the common law or custom.

² Bl. Com. 492. English authorities This doctrine will be noticed again differ upon the question whether the under the head of Distribution, *post*. writ *de rationabili parte bonorum* was

ity as to matters which pertained to the estates of the dead. Some English writers appear to have regarded this authority as in fact usurped by the ecclesiastics.¹ But Blackstone ascribes it rather to the crown's favor to the Church, citing the observation of Perkins that the law considered spiritual men of better conscience than laymen, and thought that they had more knowledge as to what things would conduce to the benefit of the soul of the deceased.² And according to the great English commentator, the disposition of intestates' effects once granted in confidence by the crown to the ordinary, the probate of wills followed as of course; for it was thought just and natural that the will of the deceased should be proved to the satisfaction of the prelate, whose right of distributing his chattels for the good of his soul was effectually superseded thereby.³ This ecclesiastical or spiritual jurisdiction—attended as it was with flagrant abuses at which the Papacy seems to have connived—doubtless inspired dread and disaffection in the temporal courts and among the English laity; for restraints were put repeatedly, by statute or judicial construction, upon the ordinary's authority, even in cases where he strove to enforce justice, and the necessity of probating wills was reduced to the narrowest limits.⁴

§ 11. **Probate Jurisdiction in the United States.**—The American system of jurisdiction over estates of the deceased was always far more simple and symmetrical than that which thus grew up in the mother country. Our early ancestors felt the need of some tribunal whence letters testamentary and of administration should issue; and at the same time, rejecting the idea of a spiritual jurisdiction and courts of bishops such

¹ Colquhoun Rom. Civ. Law, § 1413.

² Perkins, § 486; 2 Bl. Com. 494.

³ 2 Bl. Com. 494.

⁴ Colquhoun observes that the Roman law enabled bishops or their superiors to maintain suits for legacies left *in pios usus*, such as the support of the poor, and the redemption of captives; but (probably for the sake of correcting

some effort of the ecclesiastics to usurp probate jurisdiction) prohibited them from meddling with the probate or registry of wills. Colquhoun Rom. Civ. Law, § 1413. Administration of goods at the English law, he further observes, resembles in some measure the *bonorum possessio* of the Roman law. *Ib.*

as then made part of the British system, they came back to the primitive notion of county courts which should blend probate with common-law functions. From these county courts lay an appeal to the supreme temporal tribunal. But, as population grew, these powers exercised by the inferior courts called once more for a division, without, however, any necessity for placating bishops. New county tribunals were accordingly erected for the transaction of such business as might pertain to estates of the dead, testamentary trusts, the guardianship of orphans, and the like. To the old county courts was left their common-law jurisdiction, while the supreme court retained control over them all, as alike the tribunal of final resort in matters relating to common law, probate, and equity.

Such is the general origin of probate jurisdiction in the United States. But the local courts thus clothed with primary authority respecting wills and administration have borne different names and varied as to procedure in many details, in accordance with the local codes. In New England and in most of the Western States whose legislation bears the impress of New England ideas, each county has its appropriate court and judge of probate; in New York we find the county surrogate; in New Jersey an orphans' court or ordinary; in Pennsylvania and various other States an orphans' court; while in some parts of this country, and particularly the pioneer region, probate functions are still exercised by the general parish or county tribunals.¹ For convenience we shall in this treatise speak of all such tribunals as "courts of probate" (such being perhaps the most familiar designation), and the law pertaining to this jurisdiction over estates of deceased persons as "probate law." All such courts have a judge or surrogate who performs the appropriate judicial duties, and a register who records the wills, letters and accounts, for public inspection, and performs other duties corresponding more nearly to those of a clerk of courts. Probate courts and their offices constitute a part of the local judiciary system of each State; yet the functions performed by judge and register

¹ See 2 Kent Com. 226, 227; Smith (Mass.) Prob. Pract. 1-5.

are in many respects analogous to those of administrative officers.

§ 12. **Probate Jurisdiction in the United States; the Subject continued.**— These probate tribunals, or substitutes for the English spiritual courts, being of statute creation, their jurisdiction and practice are defined at much length in the several States by legislative enactment. American policy demands that estates of the dead, if not really trivial in character or amount, shall pass through the probate office for the benefit of all parties interested; that, under the scrutiny of the court, they shall be wound up regularly, expeditiously, and economically by representatives whose credentials of authority are procured from the proper county tribunal, and upon the filing of due security; that wills, whether relating to personal, real, or mixed property, shall be presented for probate as soon after the testator's death as decency permits; that the rights of all persons interested in a dead person's estate, including creditors, legatees, and next of kin, shall be sedulously protected, whether one died testate or intestate; and that, so far as may be convenient, testaments, inventories, the accounts of executors or administrators, and other essential documents showing the condition and course of settlement of each deceased person's estate shall be preserved for inspection in the county probate files, and made matter of public registry; though practically, if the representative be duly qualified, and the will or the fact of intestacy clearly placed on record, the bond of the representative affords security to all concerned that any omission to render an inventory and accounts need not work them an injury if private and family considerations hinder the pursuit of those full formalities. As the fortunes of most citizens of consequence may thus be passed in review on their death, the living man's regard for this sort of post-mortem reputation among his surviving relations, neighbors, and acquaintances, imparts a fresh stimulus to acquisition, besides imposing a check upon loose and fraudulent transactions; the muniments of title to property by will and inheritance are well preserved; and not to mention the gratification of an idler's curiosity, facts may be ascertained at the probate

registry of high importance to the public assessor, statistician, and local historian.

§ 13. **The Subject continued; Probate Procedure in the United States.**—As befits an authority which thus pervades the sanctity of a household, crosses the threshold and exposes to public view the chamber of mourning, probate jurisdiction in the United States is exercised with great simplicity of form as well as decorum. Costs and fees are trifling; the mode of procedure is by a simple petition which states the few facts essential to give the court jurisdiction; in various counties the needful blanks may be obtained from the register; and of so informal a nature is the hearing before the judge or surrogate that parties appear often without legal counsel, the usual aspect of a probate court-room in the rural counties being that of some executive office where business is summarily disposed of. In many parts of the United States probate courts are pronounced courts of record; apart from which, to authenticate wills, qualify executors and administrators, and supervise the settlement and distribution of the estates of deceased persons affords to all such local tribunals an independent and highly responsible sphere of judicial action, exclusive in the first instance. In the construction of testamentary trusts, and upon various other subjects, probate courts exercise often a concurrent authority with those of equity; and in general the right of appeal from their decrees to the final state tribunal, though exercised comparatively seldom, gives assurance that the delicate discretion reposed in these temporal magistrates will not be seriously abused.¹

¹ In New Jersey the court of chancery has concurrent jurisdiction with the orphans' court in the settlement of the accounts of executors and administrators, and may assume exclusive jurisdiction at any time before decree of allowance; but no interference will be made where the settlement is proceeding regularly in the orphans' court unless special cause is shown. *Search v. Search*, 27 N. J. Eq. 137. Under New York statutes the jurisdiction of the surrogate to

compel an account from the fiduciary is not exclusive but concurrent with the supreme court, and the right to resort to an equity tribunal appears in general peculiarly appropriate where the circumstances of a case are such as to require relief of a nature which the probate or surrogate tribunal cannot afford. *Haddow v. Lundy*, 59 N. Y. 320; *Rogers v. King*, 8 Paige, 210; *Story Eq. Jur.* §§ 530-543. Statutes relating to probate jurisdiction will not be presumed

And yet, important as must be the functions of these probate judges, public registry is the prominent feature of our county probate offices, if not of probate jurisdiction; and for system and care in preserving the public records, the judge, as well as the register, may be held responsible in a certain ministerial capacity.¹

to divest the usual chancery courts of their equitable jurisdiction in the matter of legacies, even though a concurrent jurisdiction be conferred. *Catlin v. Wheeler*, 49 Wis. 507. And in matters of purely equitable cognizance relating to the administration of estates, the probate court has presumably no jurisdiction, without enabling acts. *Butler v. Lawson*, 72 Mo. 227.

But with reference to procuring letters testamentary or of administration, the probate of wills, and the general supervision of inventories and accounts in connection with the settlement of the estate of a deceased person, the local or county probate tribunal acts in most States with plenary powers in the first place; an appeal lying to the supreme tribunal of the State, at the instance of any person aggrieved by the decree.

Rules for the guidance of the county probate courts are in various States left to the supreme judicial court (which is the supreme court of probate); and to such rules when made and promulgated each probate court must conform. *Baker v. Blood*, 128 Mass. 543. The jurisdiction of probate tribunals over claims against the solvent estates is not usually exclusive, but, at best, only concurrent with that of the common-law courts, and the creditor may elect to sue in another tribunal. *Griggs' Estate*, 11 Phila. (Penn.) 23. And see *Wapple's Appeal*, 74 Penn. St. 100.

On the whole, the doctrines which relate to probate jurisdiction should be studied in connection with the general subject of chancery powers. The English decisions afford much light on this topic; yet it should be borne in mind that probate jurisdiction in the United

States differs greatly from the English ecclesiastical jurisdiction, as understood prior to the independence of the American colonies. Our American probate system is more comprehensive than that of England, and rests more firmly upon separate state enactments and the judicial exposition of those state enactments. Probate law and practice as concerning the United States, must, in the main, be studied with reference to the judicial system of each particular State. See the authorities cited at great length, under such an arrangement, in U. S. Dig. 1st Series, Courts, II., and Annual Digests (1870 *et seq.*) under the same heading. Some of the more important points of practice will be incidentally noticed under appropriate heads in the course of the present treatise. See also such practical works upon State probate law as those of Smith (Mass.), Amasa Redfield (New York), and Gary (Wisconsin, etc.).

¹ See *e.g.* *Thompson v. Holt*, 52 Ala. 491. The register, in some States, appears capable of exercising some judicial functions of a routine character by way of deputy. *Wickersham's Appeal*, 75 Penn. St. 334; *Thornton v. Moore*, 61 Ala. 347. But, in general, the register's duties are ministerial or corresponding to those of a clerk of courts and custodian of records. He may be elected by the people, notwithstanding the power to appoint judicial officers is vested by the state constitution in the governor. *Opinion of Justices*, 117 Mass. 603. And it is within the constitutional authority of the legislature, by general law, to change the term of office, or to abolish the office itself, and transfer the powers and duties to an-

§ 14. Modern Probate Jurisdiction in England; New Court of Probate Act.—This American system—so simple, so frugally administered, so well adapted to its ends, and withal so uniform of application in settling estates of the dead, and so fully harmonizing with the arrangement of the temporal courts—appears to have gradually impressed Britons as superior to their own. In many branches of jurisprudence, doubtless, American legislators draw their inspiration from abroad; but, as for probate as well as matrimonial law, the breeze blows freshest from their own side of the Atlantic, and the United States may be regarded as preceptor to the mother country. By the English Statute of 20 & 21 Vict. c. 77 (A.D. 1857), that jurisdiction which ecclesiastical courts formerly exercised in Great Britain has been transferred to a new tribunal known as the Court of Probate, and the authority of the ordinary, as well as of the old manorial and other peculiar courts, is entirely superseded. All causes relating to the grant and revocation of probate of wills and of administration within English jurisdiction are, by that enactment, vested in the new tribunal—a temporal court whose grants and orders have full effect throughout all England, and in relation to the personal estate in all parts of England of deceased persons; and this court of probate is declared a court of record. All the powers formerly exercised by that supreme ecclesiastical forum, the prerogative court of the archbishop of Canterbury, have been thus transferred; the new probate court has the power of citation, the power to examine witnesses, and require their attendance as well as the production of deeds and documents; the power to enforce its own orders and to issue execution for costs; the power to order any instrument produced which purports to be testamentary; and the power to make rules and orders for regulating pro-

other; as has sometimes been done, where, for instance, the office of register of “probate and insolvency” was substituted for that of “register of probate.”
Ib.

A judge of probate should not grant administration in an estate in which he is personally interested; and local stat-

utes generally provide for all contingencies by allowing the judges of different counties to hold court for one another. *Sigourney v. Sibley*, 22 Pick. 507. Or by removal from the county to another court. *Burks v. Bennett*, 55 Tex. 237.

cedure. Its general practice is in accordance with the former practice of the prerogative court; the rules of evidence in common-law courts being applied in the trial of all questions of fact.¹

Appeal lies from this court of probate to the House of Lords; the privy council having formerly exercised the final jurisdiction in causes testamentary. Courts of equity are courts, as before, for the construction of wills; and so formerly, in concurrence, were the ecclesiastical courts; but the new court of probate is expressly forbidden to exercise such jurisdiction; and no suit for legacies, nor for distribution of a residue, can be brought therein. Bonds, inventories, and accounts are rendered to the court of probate; the place for depositing wills is under its control; and calendars are kept in its principal registry, district registries being established according to its direction. Application for probate or administration may be made to the court of probate; but in small estates the judge of the county where the deceased had his last "fixed place of abode" shall have the contentious jurisdiction and authority.²

The main purport of this enactment is to supplant the old ecclesiastical tribunals by a temporal court whose law and procedure shall be in harmony with the general judicial establishment of the realm; to perfect a uniform system of probate registry; and to encourage the practice of procuring credentials of authority wherever the estate of a deceased person has to be settled, at the same time increasing the facilities for so doing. The English probate practice, though simplified certainly by this later legislation, is still, however, more costly and burdensome apparently than that of most American States, and is less identified with county tribunals and the local neighborhood of the decedent.³

¹ Act 20 & 21 Vict. c. 77; Wms. Exrs. 7th Eng. ed., 290, 294, 312, 323, 344.

² Act 20 & 21 Vict. c. 77, with amendment, 21 & 22 Vict. c. 98; Wms. Exrs. 298, 301, 315, 320, 573.

³ In a recent instance, appeal was

taken from the Court of Probate to the House of Lords on an issue as to the person to whom probate should be granted. The House of Lords were evenly divided, so that the order of the Court of Probate remained unreversed. The case having been remitted to the

§ 15. Conflict of Laws in Wills and Administration; General Rule of Comity; Authority of Representative is Local; Rule as to Foreign Creditors. — The conflicting laws of various countries give rise to perplexing inquiries incidental to the settlement of an estate which must be solved on the principles of comity. As respects the estate of any deceased person, the general rule is that the law of the place of his last domicile, rather than the law of the place of his birth, or of the place where he happened to die, or of the place where the personal property was situated, shall prevail. And, if all circumstances favor, the sole, or at least the principal, grant of letters ought to be taken out and the will proved, in the country, the State, and indeed the very county, where one was a domiciled inhabitant at the time of his death. But local sovereign law does not always give way to the law of the last domicile where assets belonging to the deceased person's estate lie within the local sovereign jurisdiction, and strict compliance with the foreign law would prove detrimental to the local interests.

(1) It is a principle of English and American law that letters testamentary or of administration granted in the place of last domicile of the deceased confer no authority as such outside the jurisdiction of the State or country in which they were originally issued; and if the representative is permitted to collect effects, or to sue for assets, in an external jurisdiction, it is because of a favor extended to him, and not his right; the usual requirement being rather, as local laws frequently provide, that probate of the will (if there be one) shall be made in the jurisdiction thus invaded; and often that there shall be a local qualification of some sort and local letters taken out, if not by the principal executor or administrator, by some local person as his attorney or substitute. The due probate of a will in the original jurisdiction is, to be sure,

Court of Probate with directions that the costs of both parties should be paid out of the estate, it was found that the personal estate would not suffice to pay the costs. A chancery suit was then instituted to determine whether costs could be enforced out of the real estate; but it was held that they could not, the Court of Probate having jurisdiction only over the personalty. *Charter v. Charter*, L. R. 7 H. L. 364; *ib.* 24 W. R. 874.

often respected by the law of other States or countries, as in permitting evidence by exemplified copy from the original probate record to suffice for proof.¹ But as respects mere administration on an assumed intestacy, the fact of local assets, or of some local necessity for conferring a local probate appointment, may serve for invoking the local jurisdiction. Ancillary probate authority will be granted in one State or country under such circumstances, because principal letters testamentary or of administration have been granted elsewhere; and yet the domestic court does not necessarily defer its own appointment until the will of a non-resident testator has been proved in the State or country of his last domicile, nor, in case of the decedent's supposed intestacy, wait until administration has been granted in such State or country; but the practical convenience of creditors and citizens in its own jurisdiction will be steadily regarded, provided there be assets at hand whose owner has deceased.²

In short, the title of the executor or administrator, derived from the grant of administration in the country of the domicile of the deceased, does not extend, as a matter of right, beyond the territory of the government which grants it and the personal or movable property therein; as to movables or personal property elsewhere, the title, if acknowledged, is acknowledged only from comity; and comity yields to the local obligation of protecting domestic rights as against foreign.³

(2) With regard to the administration of foreign assets, the prevailing American doctrine favors the law of the State or

¹ *Price v. Dewhurst*, 4 M. & Cr. 76, 80; *Campbell v. Sheldon*, 13 Pick. 8; *Campbell v. Wallace*, 10 Gray, 162; *Wood v. Matthews*, 73 Mo. 477; *Shegogg v. Perkins*, 34 Ark. 117.

² *Wms. Exrs.* 362, 430; *Tyler v. Bell*, 2 M. & Cr. 89; 2 Kent Com. 434. And see *Bowdoin v. Holland*, 10 Cush. 17; *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Willard v. Hammond*, 21 N. H. 385; *Sanders v. Barrett*, 8 Ired. Eq. 246; *Story Conf. Laws*, §§ 512, 513, and numerous cases cited.

³ *Story Conf. Laws*, § 512; *Moore v. Field*, 42 Penn. St. 472. Foreign executors and administrators cannot merely by virtue of their offices, either prosecute or defend actions in the courts of other States. In some instances the disability has been removed by statute; but where that is not the case, and the representative has not removed the assets or some portion of them into the State where action is brought, the prohibition of the common law prevails. See *Webb, Matter of*, 18 N. Y. Supr. 124.

country where the assets are situated, over that of the last domicile, or at least equally to it, so far as regards creditors of the estate; it being a rule of public convenience, that property of the deceased within reach of the domestic process shall be applied to the liquidation of debts in consonance with domestic policy.¹ For, it should be observed, the application of one's property to the payment of debts is fairly regulated in every State or country according to a public sense of justice, which overrides all external regulations or legal preferences; where creditors' rights are to be enforced, there the law of the forum may well be invoked. A State or country, moreover, inclines to uphold its own priorities as to taxes and other public claims; though, as among general claimants, in case the estate, as a whole, proves insufficient to pay them in full, comity seeks apparently, in modern times, to so adjust the estate in different jurisdictions as to make a *pro rata* settlement of claims as a whole, and not expend all in paying claims of domestic citizens to the prejudice of foreign creditors.² The tendency of modern legislation in this last respect, which we gather from local statutes, is by no means selfish; it is yielding much not to appropriate local assets to the satisfaction first of local creditors.

§ 16. **Conflict of Laws; Comity Favors as to Payment of Legacies, Distribution.** — (3) But when it comes to the payment of legacies or the general distribution of the residue of one's personal estate, after debts and claims are satisfied, comity

¹ *Harrison v. Sterry*, 5 Cranch. 299; *Smith v. Union Bank*, 5 Pet. 523; *Holcomb v. Phelps*, 16 Conn. 127; *Story Conf. Laws*, §§ 480, 481, 524. As to the English doctrine cf. *Wilson v. Lady Dunsany*, 18 Beav. 293; *Carron Iron Co. v. Maclaren*, 4 H. L. Cas. 455; *Goodall v. Marshall*, 11 N. H. 88.

² *Mitchell v. Cox*, 22 Ga. 32; *Normand v. Grogard*, 14 N. J. L. 425. Some countries and States make various classes, preferring debts on judgments to simple contract debts; others accord no such preference and hence abide as to local assets by their own system,

though the deceased were domiciled abroad. Under the provisions of the Massachusetts statute citizens cannot be put to the inconvenience of proving their claims abroad when there are local assets; nor, on the other hand, can the whole estate found there be appropriated to domestic creditors; but the estate found there is to be so far disposed of, as far as practicable, that all creditors of the deceased, there and elsewhere, may receive each an equal share in proportion to their respective debts. *Davis v. Esty*, 8 Pick. 475; *Mass. Gen. Stats. c. 101, §§ 40, 41.*

highly respects the law of the last domicile of the deceased.¹ For all such dispositions of the surplus being at the sole discretion of a decedent, either as manifested by his last will and testament, if he has left one, or as defined under the will drawn up for him by the legislature of his own last domicile, so to speak, which every intestate may be presumed to have accepted in lieu of other express testamentary provisions on his own part, it is but just to give that express or implied will due effect in every country where the estate of the deceased may happen to be situated. Transmission, therefore, to legatees and distributees, of a decedent's personal estate, is governed exclusively by the law of the decedent's actual domicile at the time of his death, no matter what was the country of his birth or his former domicile, or the actual *situs* of such property at the time of his death.² On the whole, it must be pronounced advantageous as well as just for each independent sovereignty to respect a decedent's disposition of his own surplus of personal estate, and to permit one rule to regulate its beneficial distribution; and no prejudice to the rights of the sovereignty or its citizens follows the pursuance of such a course.³

It has been observed, however, that the local law does not, in such instances, give way to the law of the foreign country; but rather adopts, as part of its own law, the doctrine that

¹ *Bruce v. Bruce*, 6 Bro. P. C. 566; *Crispin v. Doglioni*, 3 Sw. & Tr. 98; s. c. L. R. 1 H. L. 301; *Holmes v. Remsen*, 4 John. Ch. 460; *Ennis v. Smith*, 14 How (U. S.) 400; Wms. Exrs. 1515, and Perkins's Am. note; *Jennison v. Hapgood*, 10 Pick. 77; *Crum v. Bliss*, 47 Conn. 592; *Russell v. Madden*, 95 Ill. 485.

² Mr. Justice Story declares that this universal doctrine was formerly much contested. Story Conf. Laws, § 481.

³ Lord Hardwicke observes in *Thorne v. Watkins*, 2 Ves. Sen. 37, that if the rule of distribution were otherwise, it would destroy the credit of the public funds; for no foreigner would put into them if the property was to be distrib-

uted differently from the laws of his own country.

The rule of the text applies as to the ascertainment of the person; and laws of local *situs* as to primogeniture yield, where personal property is concerned, to the law of the place of last domicile. Story Conf. Laws, § 481; *Crispin v. Doglioni*, 3 Sw. & Tr. 98; s. c. L. R. 1 H. L. 301. See Goodman's Trusts, *in re*, L. R. 17 Ch. D. 266, reversing L. R. 14 Ch. D. 619. But confiscation and other laws passed by the government of last domicile *after* the death of the person cannot on any just principle of comity be respected in other jurisdictions; the law *at the time of death* furnishing the true criterion. *Lynch v. Paraguay*, L. R. 2 P. & D. 263.

distribution of the surplus of personal property shall be according to the law of the owner's last domicile.¹ The law of the last domicile, as it stands at the time of an intestate's death, is taken by the local courts; with a liberal discretion, however, as to the true interpretation of that law, and a disposition to disregard retrospective changes therein tending to thwart an intestate's genuine purpose.² And the special rights of a widow, too, by way of allowance and the like, should be determined by the law in force at the death of her husband in the place of his last domicile.³

§ 17. **Conflict of Laws; Rule as to Execution and Validity of Will** — (4) Furthermore, and from similar considerations, the law of the place of last domicile regulates as to the execution and validity of wills of personal property. Wherever local assets may be found, the will of a deceased person, in order to operate thereupon, must have conformed to the law in force where he had his last domicile, and must be there entitled to probate.⁴ And the law of one's last domicile not only decides what constitutes one's last will, but whether one died testate in point of fact or intestate;⁵ so that execution, with all the formalities required in the country where the personalty is situated, cannot of itself give one's instrument the force of a valid testamentary disposition. All questions as to the forms and solemnities attending a due execution are therefore to be referred to the place of last domicile.⁶

¹ *Doe v. Vardill*, 5 B. & C. 452; *Wms. Exrs.* 1516; *Lynch v. Paraguay*, L. R. 2 P. & D. 268; *Wright v. Phillips*, 56 Ala. 69.

² *Ib.*

³ *Leib v. Wilson*, 51 Ind. 550; *Mitchell v. Word*, 64 Ga. 208; *Taylor v. Pettus*, 52 Ala. 287.

⁴ *Craigie v. Lewin*, 3 Curt. 435; *Hare v. Nasmyth*, 2 Add. 25; *Crispin v. Doglioni*, 3 Sw. & Tr. 96; s. c. L. R. 1 H. L. 301; *Grattan v. Appleton*, 3 Story, 755; 4 Kent Com. 513, 514; *Harrison v. Nixon*, 9 Pet. 483; *Crofton v. Ilsley*, 4 Greenl. 139; *Story Conf. Laws*, §§ 465-468; *Stanley v. Bernes*, 3 Hagg. 374.

⁵ *Moultrie v. Hunt*, 23 N. Y. 394. But as to regarding foreign rules of evidence in establishing a will, some qualification of the rule may be needful. See *Story Conf. Laws*, §§ 260, 634, 636, and cases cited. Foreign laws are to be proved as facts, and the question of their existence and interpretation devolves in a measure upon the local tribunal, according to the circumstances of the case and the proof accessible. *Ib.*; *Wms. Exrs.* 372, and *Perkins's n.*; *Story Eq. Jur.* § 1068.

⁶ *Schultz v. Dambmann*, 3 Bradf. Sur. 379; *Story Conf. Laws*, § 465. The authority of the executor named in the will must be determined accord-

As a corollary of our main proposition, it may be stated that, if one makes a will, valid by the law of the place where he is domiciled, and afterwards changes his domicile to a place by whose laws such a will is invalid, and there dies, the will cannot operate.¹ Nevertheless, should he move back from the latter domicile to the former before his death, with his resumption of the domicile where the will was made, the will itself, as it is considered, revives also.² And it would appear that, apart from statute, the validity and effect of a will of personal property must be determined according to the law in force at the time the will becomes operative: that is to say, when the person dies who made that will.³

§ 18. **Conflict of Laws; Rule as to Accountability of Executor or Administrator.** — (5) In general, the laws of the State or country in which an appointment, principal, or ancillary is made, govern as to the accountability of the executor or administrator for assets therein received, and the faithful or unfaithful discharge of his duties.⁴

§ 19. **Conflict of Laws; Personal and Real Estate contrasted; Situs prevails as to Real.** — (6) Administration and wills, however, have reference thus to movables or personal property. As concerns the transmission of real estate, and rights and formalities of title thereto, the law of local situation in general prevails instead. Hence, the rule that a will of real estate or of fixed and immovable property must be governed by the law of local situation, and can only operate so far as it

ing to the law of the testator's last domicile. *Laneville v. Anderson*, 2 Sw. & Tr. 24; *Oliphant in re*, 30 L. J. N. S. Prob. 82.

¹ *Dupuy v. Wurtz*, 53 N. Y. 556; *Story Conf. Laws*, § 473, citing J. Voet and other continental authorities.

² *Story Conf. Laws*, § 473.

³ *Trotter v. Trotter*, 4 Bligh N. S. 4502; *Laneville v. Anderson*, 3 Sw. & Tr. 24; *Harrison v. Nixon*, 9 Pet. 483; *De Peyster v. Clendining*, 9 Paige, 295; *Story Conf. Laws*, § 479; *Lawrence v. Hebbard*, 1 Bradf. Sur. 252;

Cushing v. Aylwin, 12 Met. 169. But see *Kurtz v. Saylor*, 20 Penn. St. 205, that capacity to make a will is determined by the law as it existed when the will was made. And see *post* as to statute changes, § 20.

⁴ *Partington v. Attorney General*, L. R. 8 H. L. 100, 119; *Kennedy v. Kennedy*, 8 Ala. 391; *Fay v. Haven*, 3 Met. 109; *Lawrence v. Elmendorf*, 5 Barb. 73; *Marrion v. Titsworth*, 18 B. Mon. 582. As to the effect of a foreign appointment see *post*, Part II.

conforms to that law.¹ And, on the other hand, if there be no will thus operative to transmit the title, the descent of such real estate or immovable property must be in accordance with the law of that local jurisdiction. The court of one State or sovereignty has no inherent power to order lands to be sold in another State or sovereignty, or to control the title thereto.²

The law of local situation may determine the character of property in this connection, as being real or personal.³ Nevertheless, comity respects the law of testamentary domicile so far as to enable property to go in the one character or the other, as the testator obviously intended.⁴ Very embarrassing questions may arise where real and personal estate are so combined in the same will that the laws of different sovereign jurisdictions must be applied.⁵

§ 20. **Conflict of Laws; General Rules varied by Treaty, Statute, etc.** — (7) The general rules of comity which we have set out may be found varied by treaty stipulations or by provisions otherwise so incorporated with the law of the place of last domicile as to introduce a different principle for the case in hand from those above announced. The law of last domicile for instance is to be construed with all its appropriate and just qualifications consistent with the equal dignity of nations. Thus, if an English-born subject dies domiciled in Belgium, and the Belgium law has prescribed a rule of succession for such persons, differing from that of natural-born subjects of Belgium, English courts will give that exception effect if beneficial, even though its consequence be to establish a testamentary disposition, valid in form according to the laws of England, but invalid according to the general law of Belgium;⁶ and on the other hand a sovereignty may correct,

¹ Story Conf. Laws, § 474; *Bovey v. Smith*, 1 Vern. 85; 4 Kent Com. 513; *Kerr v. Moon*, 9 Wheat. 565; *Potter v. Titcomb*, 22 Me. 303.

² *Boyce v. Grundy*, 9 Pet. 275.

³ Story Conf. Laws, § 447; *Chapman v. Robertson*, 6 Paige, 630.

⁴ *Enohin v. Wylie*, 10 H. L. Cas. 1; *Jerningham v. Herbert*, 4 Russ. 388.

⁵ Story Conf. Laws, §§ 485-489;

Brodie v. Barry, 2 Ves. & Beam. 130, *per* Sir Wm. Grant.

⁶ *Collier v. Rivaz*, 2 Curt. 855; *Wms. Exrs.* 368. And see *Maltass v. Maltass*, 3 Curt. 231. The foreign rule in these instances prescribed in effect for English-born subjects domiciled there that the succession to personal estate should be governed by English law.

where opportunity offers, the injustice attempted by another sovereignty towards its own subjects.

While, again, the general rule of comity refers, as we have seen, the validity of a last will of personal property, and questions of due execution to the place of last domicile, various modern statutes show more indulgence to the testator, who otherwise might inadvertently by changing his domicile after once making a perfectly valid will render that will inoperative and die literally intestate in consequence.¹ Thus, the English statute 24 & 25 Vict. c. 114, provides that wills made by British subjects out of the kingdom shall be admitted to probate, if made according to the law of the place where made, or where the testator was domiciled or had his domicile of origin.² So in Massachusetts and some other American States, it is now provided that a will made out of the State, which is valid according to the laws of the State or the country in which it is made, may be proved and allowed with the same effect as if executed according to the law of the State.³

In further extension of the general right of testamentary disposition, the English statute, 24 & 25 Vict. c. 114, enacts that wills made by British subjects within the United Kingdom (whatever the domicile of such person at the time of such execution or at the date of decease) shall, as regards personal estate, be considered as well executed and admissible to probate, if executed according to the forms in force for the time being at the place of execution; and that no will or other testamentary disposition shall be held to have become invalidated or its construction altered by reason of any subsequent change of the testator's domicile.⁴ So, in some parts of the United States, it is provided by local statute that a will made and executed in conformity with

¹ See *Dupuy v. Wurtz*, 53 N. Y. 556; Story Conf. Laws, § 473; *supra* § 17.

² This statute operates upon the wills of British subjects dying after August 6, 1861. Wms. Exrs. 374.

³ Mass. Pub. Stats. c. 127, § 5. A will thus executed, which revokes a former will, comes within protection of

this statute. *Bayley v. Bayley*, 5 Cush. 245. And so does a nuncupative will, valid where executed, though invalid if executed in Massachusetts. *Slocomb v. Slocomb*, 13 Allen, 38.

⁴ Act 24 & 25 Vict. c. 114, §§ 2, 3; Wms. Exrs. 374; *Reid in re*, L. R. 1 P. & D. 74.

the law existing at the time of its execution shall be effectual.¹

The legislation of certain States, moreover, in derogation of general rules, expressly, or by apparent intendment, permits a will which has been duly executed in another State or country to operate, if effectual at all, upon real estate as well as personal, within the jurisdiction of local *situs*.²

§ 21. **Last Domicile: what this is; Residence, Inhabitancy.** — Domicile is a word not easily defined with precision. It would appear that the Roman and civil jurisprudence laid stress upon one's place of business as well as his domestic residence; but the common law has fixed the domicile mainly from regard to one's home and the place where he exercises political rights. Domicile may be viewed as national or domestic: the one having reference to the person's country or sovereignty; the other to a political subdivision thereof, such as the county. It is the latter which determines the taking of jurisdiction as between probate county courts; but the former, when international rules are under discussion.³ The bias of the courts is found to differ in these two classes of cases; for, in the latter class, the domestic forum of last resort sits as umpire, while in the other there is no umpire, and nothing is yielded except it be in the spirit of comity. Moreover, a change of domicile in the latter instance involves conformity to a new and independent system of laws, while in the former it does not. In the United States, the law of domicile develops still greater perplexities; for there is the national domicile, which, however, is little concerned with the estates of deceased persons; the state domicile, which, for most practical purposes, is sovereign in this connection; and the domestic or county domicile.

Domicile may be regarded, in our common-law sense, as the place where one has his true, fixed, and permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning.⁴ And one's last

¹ Mass. Pub. Stats. c. 127, § 4.

² 2 Kent Com. 449; Story Conf.

³ See Mass. Pub. Stats. c. 92, §§ 4-15; Laws, §§ 39 *et seq.*, 42.

Shannon v. Shannon, 111 Mass. 331.

⁴ Bouv. Dict. "Domicile."

domicile — the prime fact upon which turn those legal issues involved in the administration and settlement of his estate — is taken to be his fixed and permanent home at the time of his decease. Every one has a domicile ; and the elements which establish that domicile are more easily conceived by the common mind than reduced to a close legal analysis. “No exact definition can be given of domicile,” observes Shaw, C. J. ; “it depends upon no one fact or combination of circumstances, but, from the whole taken together, it must be determined in each particular case.”¹ Domicile is impressed upon the new-born child by birth, and upon the wife by her marriage ; the domicile of the child follows that of its parents, and the domicile of the wife follows that of her husband. Any person *sui juris*, however, may make a *bonâ fide* change of domicile at any time. Nevertheless, one’s original domicile continues until another is acquired with a genuine full and free intention of making it one’s permanent home.²

Legal residence or inhabitancy is often used in our local legislation as though synonymous with domicile ; but these terms are not, strictly speaking, convertible. One may unquestionably be absent from his domicile ; and he may reside or inhabit elsewhere for sundry reasons of health, comfort, business, recreation, temporary convenience, and the like, without abandoning his former domicile ; for the law, especially in considering the national or sovereign domicile, favors the presumption of an intended continuance of the same domicile, and, even if the domicile has changed, treats it as revived on an intention to return. But a residence or inhabitancy, originally temporary and intended for a limited period, may afterwards become general and unlimited in its character. In all such connections the intention of the person must be studied throughout in the light of consecutive events. Such intention is manifested from conduct and circumstances, and not from words alone ; intention may change ; and when the two things concur, the fact of a changed residence, and

¹ Thorndike v. Boston, 1 Met. 245. Laws, § 45; Wms. Exrs. 1517, and Perkins’s note.

² Bouv. Dict. “Domicile”; Gilman v. Gilman, 52 Me. 165; Story Confl.

the intention of remaining there, or at least of never returning to the former domicile, the domicile is legally changed. This change must, however, have occurred from one's choice and voluntarily.¹

Domicile of origin is the first and fundamental domicile; though perhaps as against the domicile of choice, more strenuously insisted upon in English than in American practice, and where the conflict is international than where it is inter-State. One may change his domicile of origin by choosing and fixing his domicile elsewhere, with the intention of there continuing and never returning. But while American cases appear to favor a change of domicile according to one's choice, as long as he lives, if it be merely from State to State, or from county to county, the English authorities appear to keep the domicile of origin strongly in view for doubtful emergencies, and to hold that the abandonment of an acquired domicile *ipso facto* restores the domicile of origin. The application of such a rule, however, appears chiefly confined to cases of natural-born Englishmen, breaking up establishments in a foreign land.²

§ 22. **Last Domicile; Applied to the Subject of Administration.**—Were the question of one's domicile raised only while he was living, it would be comparatively easy for his intention to be established; and in portions of the United States, where a party in interest is allowed to give his own testimony, one's simple statement of his purpose, if not inconsistent with the proven facts, will often remove all doubt on such an issue; as where, for instance, the case relates to taxation. But death

¹ Bouv. Dict. "Domicile"; *Udny v. Udny*, L. R. 1 H. L. Sc. 458; *Story Conf. Laws*, § 45; *Wilbraham v. Ludlow*, 99 Mass. 587; *Huldane v. Eckford*, L. R. 8 Eq. 640. See *Colt, J., in Hallet v. Bassett*, 100 Mass. 170, that change of domicile does not depend so much upon the intention to remain in the new place for a definite or indefinite period, as upon its being without an intention to return. But Lord Westbury speaks of the inference which the law derives from

the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there "for an unlimited time." L. R. 1 H. L. Sc. 458. And see *King v. Foxwell*, L. R. 3 Ch. D. 518.

² See expressions of Lord Chelmsford, Lord Westbury, and others in *Udny v. Udny*, L. R. 1 H. L. Sc. App. 441; *Wms. Exrs.* 1521, note; *King v. Foxwell*, L. R. 3 Ch. D. 518, *per* Jessel, M. R.

leaves the question of last domicile to be chiefly inferred from extraneous facts and circumstances; each probate tribunal, moreover, which is asked to take jurisdiction upon a dead person's estate, naturally inclines to do so, and to construe all legal doubts in its own favor. In such a controversy, the presumption that one domicile shall prevail until another has been *bonâ fide* and voluntarily acquired in its stead, should be allowed great weight; and, more especially, if to concede a change thereof is to concede that the person intentionally expatriated himself and fixed his residence in another country, where opposing systems of laws must of necessity define the rights of succession. For it is a general maxim that, though one may have two domiciles for certain purposes, he can have only one for the purpose of succession.¹

§ 23. **Last Domicile; Death while on Transit, etc.** — The rule of last domicile disregards the *locus* of death, if the death occurred on transit, or otherwise at a distance from one's home. Thus, in case one dies while travelling abroad, the foreign country should take no jurisdiction, unless it be ancillary merely and founded upon the possession of property which he has there. In this country it has been held that, where a citizen removed from one State, with his family, to settle in another distant one, and died on the route, his family continuing the journey afterward, with the property belonging to the estate, letters of administration might well be granted in the place of destination, or where the family located;² and, according to the more reasonable opinion, unless the person removing had reached his intended new domicile, so that the fact of a changed residence and the intention of changing concurred, the status of distribution and of testacy should be rather according to the law of the domicile he left, as the true *locus* of a last domicile.⁴

¹ *Somerville v. Somerville*, 5 Ves. 786; *Crookenden v. Fuller*, 1 Sw. & Tr. 441; *Green v. Green*, 11 Pick. 410; *Wms. Exrs.* 1518, and Perkins's note; 2 Kent Com. 431.

² See *Aspinwall v. Queen's Proctor*, 2 Curt. 241.

³ *Burnett v. Meadows*, 7 B. Mon. 277. And see *George v. Watson*, 19 Tex. 354; *Briggs v. Rochester*, 16 Gray, 337.

⁴ *State v. Hallett*, 8 Ala. 159, *per* Ormond, J. Perhaps, if the domicile left were an acquired domicile, the dom-

Questions of this character are, however, seldom raised with reference to administration; and the courts of a State or country do not appear unwilling to maintain the domestic sovereign jurisdiction to grant letters upon the estate of a decedent where it appears convenient to do so, provided some claim may be set up that the last domicile or residence was within such limits; or, if a jurisdiction can be founded upon the locality of assets.¹ Under our statutes relating to administration, the word "domicile" is not alone employed; but local jurisdiction may be determined, to use the express words of various local enactments, by the last "residence" of the intestate, if he have one (or the place where he was last an "inhabitant"); or, if he have no such residence, etc., then by the place of his death.²

§ 24. **Locality of Personalty or Bona Notabilia may confer Jurisdiction, aside from Domicile; Questions of Double Jurisdiction.** — Last domicile affords the suitable principal forum for procuring credentials of authority and settling the estate of a deceased person. But inasmuch as the collection of credits and effects, the payment of debts, the distribution of the residue, and the final settlement of the estate, are of universal convenience, the courts of one country or State do not feel compelled to wait until those of another have acted, nor to submit domestic claims to foreign jurisdictions; but, aside from the deceased person's last domicile and a principal probate appointment, a competent local and ancillary appointment is procurable, on the suggestion that property requiring administration lies within the local jurisdiction. In other words, locality of personalty belonging to the estate of a deceased person may confer a local probate jurisdiction regardless of the consideration of his last domicile. This general doctrine is amply recognized in the statutes of Eng-

icile of origin would revive. This is the English theory. See *Lyall v. Paton*, 25 L. J. Ch. 746; *Udny v. Udny*, L. R. 1 H. L. Sc. 458.

¹ As to jurisdiction founded upon locality of property, see next section.

² See *Burnett v. Meadows*, 7 B. Mon.

277, 278. Under the Kentucky statute referred to in this case, administration where the intestate had no residence was to be determined by the place of his death or the county wherein his estate or the greatest part thereof might

be.

land and the several United States which relate to probate jurisdiction.¹

So, too, within the same national or sovereign jurisdiction, the locality of personal property may afford in various instances occasion for probate jurisdiction in two or more local courts; as where one dies intestate, being domiciled abroad, and leaves effects in the county of A and the county of B.² In England, prior to the enactment of statute 20 & 21 Vict. c. 77,³ questions of conflicting jurisdiction might arise where one died leaving *bona notabilia*, or notable goods, of £5 value or more, in different dioceses.⁴ But a convenient rule, sanctioned by statute in some American States, is that when a case lies within the jurisdiction of the probate court in two or more counties, the court which first takes cognizance thereof by the commencement of proceedings shall retain the same; and administration first granted shall extend to all the estate of the deceased in the State, and exclude the jurisdiction of the probate court of every other county.⁵

Debts due the deceased may be deemed *bona notabilia*, i.e., personalty suitable for conferring a local probate jurisdiction.⁶ And the rule is that judgments are *bona notabilia* where the record is, specialties where they happen to lie, and simple contract debts where the debtor (not the creditor) resides, and where they can be sued upon.⁷ Interest in insurance money is assets, conferring a local jurisdiction to appoint.⁸ So is any chose in action or money right, this being personal

¹ See *post*, Part II., as to foreign and ancillary appointments.

² *Ib.*

³ i.e. Probate Court act. See *supra*, § 14.

⁴ Wms. Exrs. 289, 290.

⁵ Mass. Gen. Stats. c. 117, § 3.

⁶ A *bona fide* claim of the deceased will sustain the jurisdiction, even though it should appear after the letters were issued that the claim was invalid. *Sullivan v. Fosdick*, 17 N. Y. Supr. 123.

⁷ Attorney General *v.* Bouwens, 4 M. & W. 191; *Vaughan v. Barrett*, 5 Vt. 333; *Pinney v. McGregory*, 102 Mass.

186, *per* Gray, J. Negotiable notes are *bona notabilia* in the jurisdiction of last domicile when left there at the time of the decedent holder's death. *Goodlett v. Anderson*, 7 Lea, 286. As to United States bonds deposited for safe keeping by a citizen of another State, upon a special certificate of deposit transferable by indorsement, see *Shakespeare v. Fidelity Insurance Co.*, 97 Penn. St. 173.

⁸ *Butson, Re*, 9 L. R. Ir. 21; *Hol-yoke v. Mutual Life Ins. Co.*, 29 N. Y. Supr. 75.

property and assets.¹ Modern kinds of incorporeal personal property may furnish disputes as to their locality for such a purpose, which the courts have not as yet clearly settled. But where the personal property consists of a debt owing upon some security or document of title, which of itself is commonly transferable as possessing a mercantile value, the local situation of such security or document of title would, in various instances, be well held to confer a probate jurisdiction, as of *bona notabilia*, apart from the obligor's or debtor's place of residence; as where, for instance, a savings-bank book, coupon-bond, certificate of stock, or perhaps a promissory note were left lying in another jurisdiction.² However this may be (and the inclination of each State or country is to uphold its own jurisdiction), a jurisdiction founded upon the place where the obligation is enforceable is still sustained, whether as concurrent or exclusive; thus, shares of stock are held *bona notabilia* in the county and State where the stock books are kept and dividends paid.³ Cash, furniture, and corporeal chattels are of course *bona notabilia* where they lie.

If an assignment be given as collateral security for a debt of the assignor, the debt is the asset, and the assignment only incident. If an assignment be absolute, it should be regarded only as a muniment of title which follows the *situs* of the specialty or other thing assigned. And so, as it is said, of a corporeal chattel; a bill of sale transferring that chattel follows the *situs* of the chattel as the thing happens to lie.⁴

Wherever the local statute has prescribed a jurisdiction without limitation of value, articles or money rights of trifling

¹ *Murphy v. Creighton*, 45 Iowa, 179; *Fox v. Carr*, 16 Hun (N. Y.) 434.

² *Beers v. Shannon*, 73 N. Y. 292. As to negotiable notes, see also *Goodlett v. Anderson*, 7 Lea, 286; but cf. *Owen v. Miller*, 10 Ohio St. 136. The rule above cited in the text is a very old one that specialty debts are *bona notabilia* where the bond or other specialty is; the distinction made being that debt upon *simple contract* follows the person of the debtor. Cro. Eliz. 472; Swinb. pt. 6, § 11.

³ *Arnold v. Arnold*, 62 Ga. 627; *Emery v. Hildreth*, 2 Gray, 231; *Owen v. Miller*, 10 Ohio St. 136; cf. *Goodlett v. Anderson*, 7 Lea, 286. And see, as to a mortgage note where the note and its security are enforced in a certain jurisdiction, *Clark v. Blackington*, 110 Mass. 369, 373.

⁴ *Holyoke v. Mutual Life Ins. Co.*, 29 N. Y. Supr. 75, 77, *per* Gilbert, J. See *post*, Part II., as to foreign and ancillary appointments.

consequence will uphold the local part of administration.¹ But it is assumed that the thing was left or found in the local jurisdiction so as to call *bond fide* for the grant, and has not been brought from elsewhere for the purpose of giving falsely a colorable and pretended jurisdiction to the local court.²

§ 25. **The Subject continued; whether Assets brought in may confer Jurisdiction.** — The rule of strict construction would seem to refer the locality of personalty in such cases to the *situs* as existing at the time of the deceased owner's or creditor's death. Such an interpretation, however, is too narrow to meet the practical needs of a probate appointment for local purposes in modern times; an appointment which perhaps may not be invoked for years after one's death. Hence, for the welfare of creditors and other interested parties, this right of local appointment is more liberally asserted in many of the courts, and local jurisdiction is upheld on the ground that *bona notabilia* exist when letters are applied for, notwithstanding the goods were brought into the country, or the debtor removed thither subsequently to the death of the owner or creditor;³ and this seems the better opinion,⁴ unless such bringing in or removal was in bad faith, and with the intention of conferring improperly a colorable probate jurisdiction. According to the modern current of opinion, moreover, letters of administration issued from a court of competent authority, upon the estate of a deceased person non-resident, will be presumed in all collateral proceeding to have been properly granted.⁵

¹ *Emery v. Hildreth*, 2 Gray, 231.

² *Wells v. Wells*, 35 Miss. 638; *Suarez v. Mayor*, 2 Sandf. Ch. 173.

³ See, in *Pinney v. McGregory*, 102 Mass. 186, the learned opinion pronounced by Gray, J.; Sir John Nicholl in *Scarth v. Bishop of London*, 1 Hagg. Ecc. 636. The debtor having voluntarily come to another State for a temporary purpose after the decedent's death, the right to appoint an ancillary administrator, and the right of that administrator to

sue upon the debt, has been sustained. *Fox v. Carr*, 16 Hun (N. Y.) 434.

⁴ But *cf.* *Christy v. Vest*, 36 Iowa, 285; *Goodlett v. Anderson*, 7 Lea, 286. A foreign representative who comes within another jurisdiction, bringing assets with him, may, it seems, be held to account in chancery as a trustee for those in interest. *Dilliard v. Harris*, 2 Tenn. Ch. 196.

⁵ *Hobson v. Ewan*, 62 Ill. 146; Appointment, Part II., *post*.

§ 26. **The Subject continued ; Right of Action created by Local Statute confers no External Jurisdiction.** — A right of action created by statute in one State or country is not to be regarded as property or assets which can confer a local probate jurisdiction in another State or country ; as, for instance, where the representative of a person whose death was caused by the wrongful act or negligence of another is permitted contrary to the common-law rule to sue and recover damages.¹ If the local statute empowers such action to be brought against a railway or other corporation, it may be said, moreover, that corporations, being local to the State or country which creates them, the right of action against them must be local to the same State or country.²

§ 27. **Whether Locality of a Decedent's Real Estate may confer Jurisdiction.** — Locality of real estate may often confer a jurisdiction to appoint an administrator in various American States.³ Thus, it is held in Massachusetts that administration may, upon the petition of a local creditor, be granted on the estate of a person who dies a resident of another State, leaving only real estate in Massachusetts ; notwithstanding his general estate is solvent, and an administrator has been appointed in the State where he last resided.⁴ For the local policy is, while granting letters, as, of course, with a primary reference to settling a decedent's personal estate, to license a sale of real estate in case the personalty proves insufficient ; and the local appointment simply puts local creditors in a position to thus assert their rights against the real estate, without determining of itself whether the land shall actually be sold or not.

As a rule there cannot be two valid grants of administration on the same estate within a State or country (or, in other words, within the same general jurisdiction) at the same time. But see statute provision for the instance where the assets are removed to another country, etc., after one's appointment. *Watkins v. Adams*, 32 Miss. 333.

¹ *Illinois Central R. v. Crazin*, 71 Ill. 177.

² *Ib.*

³ *Hart v. Coltrain*, 19 Wend. 378; *Apperson v. Bolton*, 29 Ark. 418; *Prescott v. Duffee*, 113 Mass. 477; *Sheldon v. Rice*, 30 Mich. 296; *Rosenthal v. Remick*, 44 Ill. 202.

⁴ *Prescott v. Duffee*, *supra*. And see as to postponing the right of the foreign and domiciliary representative to sell. *Apperson v. Bolton* and *Sheldon v. Rice*, *supra*.

§ 28. **Constitutional Points affecting Administration in the United States.** — Various constitutional points have been raised in our several State courts, most of which are referable to familiar principles. Thus it is held that a local act which draws a distinction, in the distribution of the assets of persons dying insolvent, between persons whose deaths occurred before the act went into operation and those who should die afterwards, is not unconstitutional in the sense of “impairing the obligation of contracts” ; and that under such reservations the old rule, according priority to judgment creditors, may well be abolished.¹ A special act of the legislature, it is also held, may change the administration of an estate from one county to another.²

§ 29. **Probate Jurisdiction exercised by each State separately; United States Courts should not interfere.** — In the United States, each State regulates the settlement of estates in its own jurisdiction, and no administration is extra-territorial. In each State, accordingly, estates may be settled and claims proved under the State laws. No foreign proof of claims can be enforced if the State chooses to require a re-allowance ; nor can a foreign judgment, however respected as evidence, be enforced as a judgment in the domestic jurisdiction without being established in new legal proceedings. Whatever may be done with the final balance, as between a domiciliary and ancillary jurisdiction, a dead person’s estate must be administered under the probate laws and system of the State granting letters, up to the time of distribution, or until adjudication is made as to the final balance. And it would appear that a decree by a federal court cannot affect strangers to the record or interfere with the regular probate settlement of an estate in a State court which has probate jurisdiction.³

¹ Deichman’s Appeal, 2 Whart. 395. And see Place v. Oldham, 10 B. Mon. 400.

² Wright v. Ware, 50 Ala. 549. And see Peters v. Public Administrator, 1 Bradf. Sur. (N.Y.) 200. The repeal of a law designating a certain official as administrator does not *ipso facto* revoke

the letters, but leaves the probate court to act accordingly. Hull v. Neal, 27 Miss. 424. The laws in force when the representative gave bond is presumed to govern as to its prosecution. McGovney v. State, 20 Ohio, 93.

³ Dickinson v. Seaver, 44 Mich. 624.

PART II.

APPOINTMENT AND QUALIFICATION OF EXECUTORS AND ADMINISTRATORS.

CHAPTER I.

APPOINTMENT OF EXECUTORS.

§ 30. **Modern Definition of Executor.** — While in modern times it cannot be strictly said that the designation of a particular executor is essential in order to constitute a will, every executor doubtless derives his authority from such an instrument. An executor should in fact be defined as one to whom the deceased has duly committed the execution or putting in force of his last will and testament ; or, in other words, the settlement of his estate.¹ In such a connection *haeres testamentarius* is the usual term of the Roman law as to movables ; and as Lord Hardwicke once observed, “executor” is a barbarous term unknown to that law ;² the truth being, however, that the testator seldom committed execution (or perhaps one should say, administration) to any other person than the testamentary heir himself ; whereas, by the codes of modern Europe, the general employment of executors is partly favored, as persons, not necessarily legatees, but rather official representatives of the estate, to carry out the provisions of the will.³

¹ 2 Bl. Com. 503; 1 Wms. Exrs. 7th ed. 226; Bouv. Dict. “Executors”; *supra*, § 3.

² 3 Atk. 304.

³ Domat. Civ. Law, §§ 3330–3332. What we call “executor and residuary legatee” corresponds to this testamentary heir of the Roman law, against whose knavery it was found necessary after long experience to extend the safe-

guards for particular legatees and other persons interested in the estate. *Ib.*

Swinburne and other early writers of our law state other acceptations of the word *executor* inclusive of *administrator*, but the *executor a testatore constitutus*, or *executor testamentarius* is the only one meant in modern English speech. 1 Wms. Exrs. 226.

§ 31. **Designation of Executor under a Will; the Trust may be absolute or qualified.** — Whenever the testator nominates an executor, this is enough to make his instrument a will and require its probate as such, even though no legacy be given and no special direction of a testamentary character. Nor is it uncommon for one to make his last will and testament for the sole purpose of selecting or nominating the person or persons who shall administer; meaning that his estate shall be managed and distributed upon his decease as though he had died intestate.¹

Furthermore, the interest of every executor in his testator's estate is what the testator may have given him; and hence a testator may make the trust absolute or qualified respecting his property; qualifying the trust as to the subject-matter, the place where the trust shall be discharged, and the time when the executor shall begin and continue to act as such.²

§ 32. **Who are capable of becoming Executors; Rule as to married Women, Infants, Corporations, Aliens, &c.** — All persons, generally speaking, are capable of becoming executors who are capable of making wills.³ The favor of our law extends even further in this respect. For, while a wife, under the old rule of coverture, was held incapable of making contracts or a valid will,⁴ the husband might concur in the appointment, or, so to speak, perform the trust vested in her as executrix or administratrix, and only the wife's temporary legal disability, and the husband's liability for her acts, obstructed practically her sole performance of such duties under an appointment which the spiritual courts at all events were inclined to recognize.⁵ An infant, too, though not of full

¹ Lancaster, Goods of, 1 Sw. & Tr. 464; Jordan, Goods of, L. R. 1 P. & D. 555; 1 Wms. Exrs. 227.

² Mr. Justice Wayne in Hill v. Tucker, 13 How. 466. And see § 40, *post*.

³ 2 Bl. Com. 503.

⁴ As to her will, see Schoul. Hus. and Wife, §§ 457-470.

⁵ Schoul. Hus. and Wife, §§ 163, 460, and cases cited; 1 Wms. Exrs. 232-235.

Wife made sole executrix with her husband's consent. Stewart, *in re*, 56 Me. 300. And see Lindsay v. Lindsay, 1 Desau. 150. Statutes sometimes require the husband to join in the wife's bond as executrix. See Airhart v. Murphy, 32 Tex. 131; Cassedy v. Jackson, 45 Miss. 397. Local statutes greatly enlarge at the present day the married woman's rights in these as in other respects. Schoul. Hus. and Wife, Ap-

testamentary capacity, may, however young, and even while unborn and *in ventre sa mere* be appointed executor;¹ our modern statutes, however, disqualifying one from performing the functions of sole executor during his minority, and granting administration *cum testamento annexo* to another until such infant shall have attained minority.²

Whether a corporation aggregate can be executor has long been doubted.³ In some parts of the United States this point is decided adversely as to aggregate corporations in general;⁴ though companies may now be found whose charters expressly permit the exercise of such functions in connection with the care and investment of trust funds. Modern English practice recognizes the right of a corporation unsuitable for the trust, which is named executor, to nominate persons who may execute the trust in its stead.⁵ A corporation sole or official, such as the mayor of London or the bishop of Exeter, may be and act as executor. And so may a co-partnership, in the sense that the individual members composing it, and not the firm collectively, shall be entitled to the trust.⁶

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pendix; Curser, *Re*, 25 Hun, 579. As to the capacity of a wife for such trusts where living separated from her husband, see Hardinge, Goods of, 2 Curt. 640. And see *post* as to administration by a wife.

The English canon law, like the civil, made no distinction between women married and unmarried, and hence permitted a wife to take upon her the probate without the consent of her husband. Godolph, Pt. 2, c. 10, § 3; Dye, Goods of, 2 Robert. 342. But such were the practical disabilities of coverture, and the necessity of joining husband and wife in suits, that chancery sometimes enjoined the wife from performing the duties of executrix. Taylor v. Allen, 2 Atk. 212. And see 2 Wms. Exrs. 233-235; English v. McNair, 34 Ala. 40. The husband cannot compel his wife to accept an executorship. 1 Wms. Exrs. 235. He may object, however, to her doing so; though it is held under English statutes that having so objected, where she was named sole executrix,

the grant may be made to her attorney. Clarke v. Clarke, L. R. 6 P. D. 103. A man marrying a woman who is an executrix becomes executor in her right and as such accountable. Wood v. Chetwood, 27 N. J. Eq. 311; Schoul. Hus. and Wife, § 163.

¹ Wms. Exrs. 232; Piggot's Case, 5 Co. 29 a; 2 Bl. Com. 503.

² 38 Geo. III. c. 88, § 6. Previous to this statute an infant seventeen years old might in England act as executor. See *post* as to administration. As to American statutes, see Christopher Cox, 25 Miss. 162; Schoul. Dom. Rel. § 416.

³ 1 Wms. Exrs. 7th ed. 228, 229.

⁴ Georgetown College v. Brown, 34 Md. 450; Thompson's Estate, 33 Barb. 334. *Qu.* as to the New Jersey rule. Porter v. Trall, 30 N. J. Eq. 106.

⁵ Darke, *In re*, 1 Sw. & Tr. 516.

⁶ Fernie, *In re*, 6 Notes of Cas. 657; 1 Wms. Exrs. 229. As to making one's probate judge his executor, see Gregory v. Ellis, 82 N. C. 225; Ayres v. Weed, 16 Conn. 291.

Non-residence does not necessarily disqualify an executor at common law. Thus an alien friend is not, by the English law, disqualified from becoming an executor; and even as to alien enemies, the rules of modern warfare regard the private interests of foreigners more generously than formerly.¹ In the United States the right of non-residents to become executors or administrators is regulated by local legislation not by any means uniform; but the better policy favors such rights, provided that adequate security be furnished for protecting the interests of parties dwelling within the State, so that, at all events, the non-resident may designate the party resident who should represent him; while, as between citizens merely of different States, a rigid rule of exclusion seems especially harsh.²

§ 33. **Who are Capable of becoming Executors; Rule as to Criminals, Dissolute Persons, Insolvents, etc.** — The principle thus indicated is, that one's choice of an executor by his last will being so solemn an act, and by a person legally capable of making a choice among friends and kindred, his last wishes should be heeded. And so far has our law carried this principle as to permit persons obviously unsuitable for the trust to exercise it to the detriment of creditors and legatees, on the suggestion that the testator, at all events, must have confided in such a person. Moreover, as courts have observed with a touch of false logic, the office of executor being held in another's right, is not tainted by his personal guilt.³ Hence, not only might persons attainted or outlawed for political offences become executors, but even those convicted of felony; crime seldom if ever operating to disqualify one for the trust;⁴ and persons immoral or habitual drunkards were

¹ See 2 Wms. Exrs. 229-231, and *n.* by Perkins; Co. Lit. 129 b. The rule differs in various States. Most of the decisions relate, however, to administrators, and perhaps an executor deserves greater consideration. See McGregor *v.* McGregor, 1 Keyes (N. Y.) 133; Cutler *v.* Howard, 9 Wis. 309; Sarkie's Appeal, 2 Penn. St. 157; Administration, *pass.*

² As to refusing to take the oath of allegiance, see Vogel *v.* Vogel, 20 La. Ann. 181.

³ Smethurst *v.* Tomlin, 2 Sw. & T. 143.

⁴ 1 Wms. Exrs. 7th ed. 235, 236; Co. Lit. 128 a; 3 Bulst. 210; Killigrew *v.* Killigrew, 1 Vern. 184; Smethurst *v.* Tomlin, 2 Sw. & T. 143.

permitted to serve.¹ But the tendency of our modern legislation is to correct this evil, not by permitting a qualified executor's authority to be collaterally impeached, but by enlarging the discretionary power of courts having probate jurisdiction, so that persons dissolute or otherwise, and evidently unsuitable, shall not be qualified, or, if qualified, may be afterwards removed for cause duly shown.² For the interests of creditors and legatees should be respected more than any gratification of the testator's caprice in selecting the trustee of those interests; and the proper execution of his will is paramount to execution by any particular agency.

Hence, too, poverty, or even insolvency, constitutes no legal cause at common law for disqualifying one from the office of executor; and thus have English cases insisted to the extent of compelling spiritual courts to respect the testator's choice, where the executor named had absconded, or after the probate had become bankrupt, and where legatees were left without adequate security.³ In consequence, however, of such hardships, the court of chancery assumed jurisdiction, and receivers may now be appointed under its direction, and the bankrupt or insolvent restrained from committing acts injurious to the estate.⁴ This jurisdiction in the United States is aided further by local statutes which require an executor to give bonds to the probate court for the faithful discharge of his trust, either with or without sureties, as may

¹ *Sill v. McKnight*, 7 W. & S. 244; *Berry v. Hamilton*, 2 B. Mon. 191.

² See *pass.* c. as to appointing administrators. These statutes have reference to both executors and administrators. And for habitual drunkenness, as well as lunacy, duly shown, the letters testamentary may be revoked. *Sill v. McKnight*, 7 W. & S. 244; *Webb v. Dietrich*, 7 W. & S. 402. And see *McGregor v. McGregor*, 33 How. (N. Y.) Pr. 456. Letters refused to the paramour of a dissolute testatrix. *Plaisance's Estate*, Myrick (Cal.) 117. But, aside from statute, the court cannot refuse to qualify an executor on account of his

immoral character. *Berry v. Hamilton*, 12 B. Mon. 191.

³ 1 Salk. 36, 299; 3 Salk. 162; Swinb. pt. 5, §§ 2-10; 1 Wms. Exrs. 236; *Hathornthwaite v. Russell*, 2 Atk. 127.

⁴ *Rex v. Simpson*, 1 W. Bl. 458; *Utterson v. Mair*, 2 Ves. jr. 95; *Scott v. Becher*, 4 Price, 346; *Ellis, Ex parte*, 1 Atk. 101; *Elmendorf v. Lansing*, 4 John. Ch. 562. So, too, where an executrix marries a man bankrupt or insolvent, who would otherwise have mismanaged the trust in her right. *Stairley v. Babe*, 1 McMull. Ch. 22. Authority under bankrupt acts appears to be an element in such jurisdiction.

be adjudged prudent in the interests of the estate.¹ Chancery, aside from such legislation, may oblige an insolvent executor, like any other trustee, to furnish security;² but not because of his poverty or insufficient estate alone;³ and where it is shown that the testator made his choice knowing that the person in question was bankrupt or insolvent, the court hesitates to control the latter, out of mere regard to those adversely interested, unless invested with a statute discretion.⁴

By both the common and civil law, idiots and lunatics have been deemed incapable of becoming executors; a good reason, at the outset, being that such a person cannot determine whether to accept the trust or not;⁵ and since, furthermore, an insane person is in no condition to perform the functions of the office at all, the court may commit administration to another where the executor becomes afterwards insane.⁵ In some of our States legislation provides fully for the emergency by facilitating the power of making removals in such cases.⁶

Modern legislation, however, enlarges the control of probate courts over improper testamentary appointees. Thus, in Massachusetts, the probate court has a discretionary power to remove or refuse to appoint executors when insane or otherwise incapable of discharging the trust, or evidently unsuitable therefor.⁷ In the New York code, the necessary quali-

¹ See *post* as to bonds of executors and administrators.

² 1 Eq. Cas. Abr. 238, pl. 22; Bac. Abr. Executors, A. 6; Slanning v. Style, 3 P. Wms. 336; 1 Wms. Exrs. 237; Mandeville v. Mandeville, 8 Paige, 475.

³ Hathornthwaite v. Russell, 2 Atk. 126; Mandeville v. Mandeville, 8 Paige, 475; Wilkins v. Harris, 1 Wins. (N. C. Eq.) 41; Bowman v. Wooton, 8 B. Mon. 67. Mere poverty existing at the testator's death, without maladministration, loss, or danger of loss, from misconduct or negligence, will not authorize a court of equity to put the executor under a bond, or, as an alternative, require him to give up the office. Fairbairn v. Fisher, 4 Jones Eq. 390.

⁴ Wms. Exrs. 237; Langley v. Hawke, 5 Madd. 46. It should not, however, be readily inferred from the mere circumstances of execution that the testator expected that the person would be a bankrupt or insolvent when the time came to assume the functions of executor. *Ib.*

⁵ Bac. Abr. Executors, A. 5; 1 Salk. 36; 1 Wms. Exrs. 238; Evans v. Tyler, 2 Robert, 128, 134.

⁶ McGregor v. McGregor, 1 Keyes, 133; 33 How. (N. Y.) Pr. 456.

⁷ Mass. Pub. Stats. c. 131, § 14. As a person "evidently unsuitable," one may be removed or refused the executorship, on the ground that his individual claims on the estate would conflict with his duties as executor. Thayer v. Homer,

fications of an executor are prescribed with minuteness; and drunkenness, dishonesty, improvidence, want of understanding, conviction of an infamous crime, may render one incapable of exercising the trust, as well as other causes, to be referred to the principle of unsuitableness.¹ While, therefore, on the whole, the old law dealt tenderly with the choice of the deceased, modern statutes, and more perhaps those of the United States than of England, regard with much concern the interests of those taking rights under the will; and, instead of sanctioning temporary grants by way of superse-
dure for an emergency, permit rather that letters testamen-
tary be refused or the unsuitable incumbent summarily removed from office.

§ 34. **Miscellaneous Disabilities for the Office.** — It should be added that, so long as probate law was shaped by canonists and ecclesiastics, and persecutions were made for conscience's sake, numerous religious disabilities existed in English law, which have since been taken off by Parliament, and at the present day find recognition neither in England nor the United States.²

§ 35. **Express Appointment of Executor by Testament.** — An executor must necessarily derive his appointment from a testament; for if the will designates no one for that office, the

11 Met. 104, 110. See Hubbard, J. *ib.* So, too, under a similar Wisconsin statute, a hostile feeling between the executors and parties interested plainly detrimental to the management of the estate may justify removal. Pike's Estate, 45 Wis. 391. An executor ought not to be removed, after having been once appointed and qualified, as evidently unsuitable for the discharge of his trust, simply on proof that he was unsuitable at the time of his appointment and without proof that he continues to be so. Drake v. Green, 10 Allen, 124. And see Hursey v. Coffin, 1 Allen, 354.

¹ See McGregor v. McGregor, 33 How. (N. Y.) Pr. 456; 1 Keyes, 133;

Freeman v. Kellogg, 4 Redf. (N. Y.) 218. And see Webb v. Dietrich, 7 W. & S. 402; Plaisance's Estate, Myrick's Prob. 117.

² Not only were traitors and felons considered incapable of becoming executors by the civil and canon law, but heretics, apostates, manifest usurers, famous libellers, incestuous bastards, and persons standing under sentence of excommunication. Swinb. pt. 5, §§ 2-6. Other disqualifications were created, during the religious struggles of the 17th and 18th centuries, by legislation; relating, for instance, to Popish recusants on the one hand, and those denying the Trinity or the Christian religion on the other. See Wms. Exrs. 7th ed. 237, 238.

court commits the trust to an administrator with the will annexed.¹ Nor, as the old books have said, can an executor be instituted by a mere codicil; though executors doubtless may be substituted or added by a codicil, where the original will made the primary appointment.²

§ 36. **Constructive Appointment by designating Functions, etc.; Executor according to the Tenor.** — But no particular form of appointing an executor is prescribed, nor is it necessary that one be designated by that particular name. A constructive appointment suffices; as where the testator indicates his desire that the essential functions of that office shall be discharged by a certain person; in which case one is said to become executor under the will according to the tenor.³ Thus the testator's declaration that A. B. shall have his goods to pay his debts and otherwise to dispose at his pleasure, and such like expressions,⁴ may suffice for this purpose. So, too, the commitment of one's property to the "administration" or to "the disposition" of A. B.;⁵ or the direction that A. B. shall pay debts and funeral and probate charges; or shall receive the property and pay the legacies;⁶ or the gift to A. B. of all one's property, to apply the same, "after payment of debts," to the payment of legacies.⁷ For all such expressions point at the essential functions of an executor; functions which exist in consistent combination. Any words which substantially confer upon a person, either expressly or by implication, the rights, powers, and duties of an executor, amount to such appointment under the will.⁸

¹ 1 Wms. Exrs. 239; 3 Redf. Wills, 2d ed. 62.

² Swinb. pt. 1, § 5, pl. 5; 1 Wms. Exrs. 8. As for naming A. sole executor in a will, and B. sole executor in the codicil, see Wetmore v. Parker, 7 Lans. 121. And see Woods, Goods of, L. R. 1 P. & D. 556.

³ Fraser, Goods of, L. R. 2 P. & D. 183; 1 Wms. Exrs. 239, and Perkins's note; Hartnett v. Wandell, 60 N. Y. 350; State v. Rogers, 1 Houst. 569; Carpenter v. Cameron, 7 Watts, 51;

Grant v. Spann, 34 Miss. 294; Myer v. Daviess, 10 B. Mon. 394.

⁴ Henfrey v. Henfrey, 4 Moo. P. C. 33; Cro. Eliz. 43.

⁵ Cro. Eliz. 164; 1 Wms. Exrs. 239.

⁶ Pickering v. Towers, 2 Cas. temp. Lee, 401; 2 Redf. Wills, 2d ed. 62; Fry, Goods of, 1 Hagg. 80.

⁷ Bell, Goods of, L. R. 4 P. D. 85. And see Manly, *in re*, L. R. 1 P. & D. 556.

⁸ Carpenter v. Cameron, 7 Watts, 51; Grant v. Spann, 34 Miss. 294; Nunn v. Owens, 2 Strobb. 101.

§ 37. **The same Subject; Mere Designation of Trustees, Legatees, etc., Insufficient for Executorship.** — Where, however, the court cannot gather a testamentary intent that the person in question should collect dues, pay debts, and settle the estate like an executor, executorship, according to the tenor, will not be granted. For instance, it will not if A. B. is designated simply to perform some trust under the will;¹ since trustees under a will are not necessarily executors, but are postponed in office to the latter and to a due administration of the estate, taking out separate letters; otherwise, however, when the execution of the will was evidently conferred likewise upon the trustees, the style of the parties as such, concluding by no means their right to be considered executors also, and to receive letters in such capacity.²

A testamentary direction that one's property shall, upon his decease, go at once to the legatees or to trustees, as if to dispense with administration and the payment of debts altogether, or to confer the authority out of course, would be nugatory;³ and, in such case, the will having provided neither expressly nor by implication for a lawful executor, the case becomes one for granting administration *de bonis non*, the usual procedure, as we shall see hereafter, wherever there is a will but no executor.⁴ As for language in a will referring to one as "executor and trustee," it should be observed that the offices of executor and trustee are distinct, and that duties of the trust are properly to be performed in a separate capacity from those of executor.⁵

Earlier authorities favor the position that one who is named universal heir or legatee under a will may take probate as

¹ Jones, Goods of, 2 Sw. & T. 155; 1 Wms. Exrs. 242; Punchard, Goods of, L. R. 2 P. & D. 369; Wheatley v. Badger, 7 Penn. St. 459.

² Myers v. Daviess, 10 B. Mon. 394; McDonnell, *Ex parte*, 2 Bradf. Surr. 32; State v. Watson, 2 Spears (S. C.) 97. And see Knight v. Loomis, 30 Me. 204; Simpson v. Cook, 24 Minn. 180, that naming the same person as executor and trustee does not necessarily extend the

trusteeship to others who may be appointed to execute the will.

³ Toomy, Goods of, 3 Sw. & Tr. 562; Drury v. Natick, 10 Allen, 174; Newcomb v. Williams, 9 Met. 533, *per* Shaw, C. J.; Hunter v. Bryson, 5 Gill & J. 483.

⁴ See Administration, *post*.

⁵ Wheatley v. Badger, 7 Penn. St. 459.

executor;¹ but unless language importing the right to settle the estate is superadded,² the better and the present practice is to grant him administration with the will annexed, instead of letters testamentary, according to the tenor.³

§ 38. **The same Subject; Identifying the Executor.** — There should be some means of identifying the person designated by the will to serve as executor, else the designation cannot operate. But an executor who is imperfectly described or designated in the will may, by extrinsic evidence, be identified as the person actually intended by the testator.⁴ So an erroneous and ambiguous description in the will may be corrected by extrinsic evidence showing which of two persons was really meant.⁵

§ 39. **The same Subject; Suggested Executor; Adviser, etc.** — The appointment of a sole or joint executor may be by way of request or suggestion rather than mandate on the testator's part,⁶ and a probate court may consider its force accordingly.

One who is named in the will as though an assistant in the trust is, by American practice, usually qualified like any co-executor; English cases follow often the same rule. But a testator will sometimes name another person besides his actual executor to advise, oversee, or assist the latter in the performance of his duties; and such a person, not unfrequently encountered in English practice, has, if so the testator obviously intended, none of the rights or responsibilities

¹ Godolph, pt. 2, c. 5, § 3; Swinb. pt. 4, § 4, pl. 3; Androvin v. Poilblanc, 3 Atk. 301, *per* Lord Hardwicke.

² Grant v. Leslie, 3 Phillim. 116.

³ 1 Wms. Exrs. 240; Oliphant, Goods of, 1 Sw. & Tr. 525. And see Adamson, Goods of, L. R. 3 P. & D. 253. Where the testator bequeathed all his property to his three sisters, or to such of them as survived him, and appointed either one "his sole executrix," and only one survived him, *held* that this was insufficient designation of her as

executrix. Blackwell, Goods of, 25 W. R. 305.

⁴ In De Rosaz, Goods of, 25 W. R. 352, "Perceval — of B., Esquire," was shown to be a friend of the testator, a person whose middle name was "Perceval." And see Wigram, Evid. 4th ed. 98; Clayton v. Lord Nugent, 13 M. & W. 207; Baylis v. Attorney General, 2 Atk. 239.

⁵ Brake, Goods of, 29 W. R. 744.

⁶ Brown, Goods of, 25 W. R. 431.

of executor, nor any right to intermeddle, but may advise, complaining to the court if his advice is injuriously neglected.¹

§ 40. **The same Subject; Conditional Appointment; Substitution; Co-executors, etc.**—From a will, or the will and codicils taken together, may be deduced various provisional appointments of executor. These should be respected according to the testator's manifest intent. Thus, if one be made executor upon condition that another will not accept or is dead, the latter, if he prove alive and willing at the time of probate to accept, must be accorded the preference, as the language of the will implies.² An executor by the tenor may be qualified jointly with one expressly nominated.³

Where several executors are named or designated, all may be qualified as co-executors, though all are thus legally regarded as an individual, in place of a sole executor.⁴ A testator may, however, appoint several executors under his will, substituting one after another in order, so that, if the first cannot act, the next may, and so on; in which case the question may arise, whether the substitution relates merely to a precedence once and for all at the time the will takes effect, or so as to provide for a successor whenever, prior to a final settlement of the estate, a vacancy may possibly occur in the office.⁵ The appointment of executors under a will may be revoked by the substitution of others under a codicil,⁶ or a re-appointment with others may be made instead;⁷ and of various persons named as co-executors, he or they who may be alive and willing to accept the trust on the testator's decease can alone be deemed qualified for the office.

An executor by the tenor may, if the will so intended, receive letters jointly with an executor expressly named.⁸ And a person expressly appointed executor for limited purposes

¹ 1 Wms. Exrs. 7th ed. 244; Powell v. Stratford, cited 3 Phillim. 118; 3 Redf. Wills, 2d ed. 63.

² 1 Wms. Exrs. 243; 2 Cas. temp. Lee, 54; Swinb. pt. 4, § 4, pl. 6.

³ Grant v. Leslie, 3 Phillim. 116; 1 Wms. Exrs. 245.

⁴ 1 Wms. Exrs. 246.

⁵ Langford, Goods of, L. R. 1 P. & D. 458; Wilmot, Goods of, 2 Robert. 579; Lighton, Goods of, 1 Hagg. 235.

⁶ Bailey, Goods of, L. R. 1 P. & D. 608.

⁷ Leese, Goods of, 2 Sw. & Tr. 442.

⁸ 1 Wms. Exrs. 245; Grant v. Leslie, 3 Phillim. 116.

may, by a codicil, receive by implication full general powers.¹ There is no legal objection to qualifying one executor for general purposes, and another for some limited or special purpose, if such be the testator's manifest intention.²

§ 41. **Testator's Delegation of the Power to Name an Executor or Co-executor.**—The English ecclesiastical courts were accustomed to grant letters testamentary as executors to persons named by those who had a nominating power conferred under the will.³ And under the English wills act, this practice is still sanctioned.⁴ In some parts of the United States also, the testator's right to delegate to some person designated in the will the power to name an executor is likewise upheld.⁵ And thus may a testator authorize the probate court to appoint as executor a suitable person in the event of the resignation, inability, or refusal to act, of the executor named by the testator himself in his will.⁶ Recent cases have in this manner permitted further a successorship to be maintained, so that of two or more original executors, the survivor or survivors shall fill the vacancy;⁷ all of which, however, should be subject to the court's discretion. A like delegation of power may be to one executor, in order that he may name his own associate.⁸ A person authorized to nominate an executor has sometimes nominated himself, and thus obtained the office.⁹

§ 42. **Limited or Conditional Executorship.**—From what has been said, the reader will infer that the office of executor is

¹ Aird, Goods of, 1 Hagg. 336.

² Lynch v. Bellew, 3 Phillim. 424; 1 Wms. Exrs. 245.

³ Cringan, Goods of, 1 Hagg. 548.

⁴ 2 Redf. Wills, 63; 1 Wms. Exrs. 245-247; Jackson v. Paulet, 2 Robert. 344.

⁵ Hartnett v. Wandell, 60 N. Y. 346. Here, as in Jackson v. Paulet, *supra*, it is maintained that a statute requirement that the court shall issue letters to the persons named in a will as executors does not preclude the issue of letters to one not expressly named but duly designated as such by virtue of such a power.

The case is unlike that of a testator's reserving power to himself to deal informally hereafter with his will.

⁶ State v. Rogers, 1 Houst. (Del.) 569. Such person being hereby "appointed to be my executor" in the language of the will, it is proper for the court to grant him letters testamentary instead of letters of administration with the will annexed. *Ib.*

⁷ Deichman, Goods of, 3 Curt. 123; Jackson v. Paulet, 2 Robert. 344.

⁸ Hartnett v. Wandell, 60 N. Y. 346.

⁹ Ryder, Goods of, 2 Sw. & Tr. 127.

not always conferred absolutely. Wills, we know, are usually drawn, so that A. B. is named executor, or perhaps A. B. and C. D., or A. B., C. D., and E. F.; and, whether one or more executors, the rights and duties thus devolve upon the person or persons named fully and immediately upon the testator's death; so that, if there be a condition precedent at all, it is only such as probate law interposes in order that the will may be duly proved and the executor qualified by letters testamentary. But a testator may, and sometimes does, impose conditions and limitations under the will at his own discretion; and the old books state numerous instances of the sort. Thus, the executor's appointment may be conditional upon his giving security for paying the debts and legacies,¹ or so long as he does not interfere with M.'s enjoyment of Blackacre,² or after he has paid such a debt,³ or provided he prove the will within three calendar months after the testator's death;⁴ and such condition failing, whether precedent or subsequent, the appointment fails upon the usual principle of a conditional appointment.

Again, there may be limitations placed by the testator upon the exercise of the office; as where one commits the execution of his will in different countries⁵ (or even, as the old books lay it down, in different counties⁶) to different persons. So it is said that one may divide the duties of executor with reference to the subject-matter: appointing one for

¹ Godolph, pt. 2, c. 2, § 1; 1 Wms. Exrs. 7th ed. 253. The procurement of such security, where prudence requires it, is an element in modern probate practice, independently of the testator's directions. See bonds, *post*.

² Dyer, 3 b, pl. 8; Cro. Eliz. 219.

³ Stapleton v. Truelock, 3 Leon. 2, pl. 6.

⁴ Wilmot, Goods of, 1 Curt. 1. Here the day of death was held to be excluded in the computation of time.

⁵ Hunter v. Bryson, 5 Gill & J. 483; Mordecai v. Boylan, 6 Jones Eq. 365; Despard v. Churchill, 53 N. Y. 192. An English testator appoints a resident of Portugal to be his executor in that

country. This does not entitle the Portuguese executor to letters in England. Velho v. Leite, 3 Sw. & Tr. 456. So there may be general executors entitled to letters in England, and limited executors added for India. Wallich, Goods of, 3 Sw. & Tr. 423. As to granting ancillary letters in a State or jurisdiction foreign to the place of the testator's domicile and place of original probate or administration, see c. *post*, ancillary appointments.

⁶ Swinb. pt. 4, § 18, pl. 1, 4; 1 Wms. Exrs. 251, 252. Such a division of localities in one jurisdiction, however, seems unreasonable in practice.

the cattle, another for the household stuff, another to grant leases, and another to collect debts;¹ but Lord Hardwicke exposed the absurdity of such a division, inasmuch as executors must act jointly, and each have authority as to the whole estate;² and creditors certainly may sue them in such a case as united in privity, just as though there were only one executor.³

There may be a postponement of the office, or some proviso by way of succession or the substitution of one executor or set of executors for another. Thus, two persons may be appointed executors with a provision that the one shall not act during the life of the other;⁴ or so that B. shall succeed A. in case of A.'s death, incapacity, or unwillingness to serve.⁵ So, too, one may be appointed for a definite period of time, or during the minority of his son, or the widowhood of his wife, or until the death or marriage of his son, or the re-marriage of his widow, or while the instituted executor is absent from the country.⁶ In all such cases, if a vacancy in the office occurs at any time which the will itself does not supply, whether permanent or during the interval that must elapse between the ending of one executorship and the beginning of another, the probate court should grant administration with the will annexed of such tenor as the emergency requires.⁷

In short, there may be various qualifications imposed by one's will upon the executor or executors therein appointed. Various substitutes may be designated to serve upon one and another contingency, and in succession instead of jointly; executors, moreover, may be appointed having separate and

¹ Dyer, 4 a; Godolph. pt. 2, c. 3, pl. 2, 3; 1 Wms. Exrs. 252.

² Owen v. Owen, 1 Atk. 495, *per* Lord Hardwicke.

³ Cro. Car. 293; 3 Redf. Wills, 2d ed. 65. And see Mr. Justice Wayne in Hill v. Tucker, 13 How. (U. S.) 466.

⁴ Wentworth Off. Ex. 13; 1 Wms. Exrs. 250, 251; 3 Redf. Wills, 65.

⁵ Lighton, Goods of, 1 Hagg. 235.

⁶ Wms. Exrs. 251; Carte v. Carte, 3 Atk. 180; Cro. Eliz. 164; 2 Cas. t. Lee, 371. Other instances are mentioned by

Swinburne and other early writers; as, where the testator appoints one to be his executor at the end of five years after his death, or at an uncertain time. Swinb. pt. 4, § 17, pl. 1-4. Except it be by way of substituting some new executor for a predecessor upon the happening of some event, such executorships are seldom created.

⁷ 3 Redf. Wills, 65; Swinb. pt. 4, § 17, pl. 2. See c., *post*, as to administration with the will annexed.

distinct functions to discharge, some full and general, others limited and special, in authority. For, as Mr. Justice Wayne has observed, while the estate of an administrator is only that which the law of his appointment enjoins, an executor's interest in the testator's estate is what the testator gives him.¹ But where the authority of the executor is restricted, this should appear in the letters testamentary.² Nor can a testator appoint one an executor, and at the same time prohibit him from administering the estate; for this would be to deny him the essential functions of the office.³

§ 43. **Whether the Executorship passes to an Executor's Representatives.** — An executor cannot assign his executorship, the trust being pronounced in such connection a personal one;⁴ nor can the executorship pass upon his death to his legally appointed administrator.⁵ If there were several executors, so that one at least still survives in the office, no interest is transmissible by the deceased executor.⁶ But by the English law, wherever a sole executor had assumed office under the will, or all co-executors had died, so that no surviving executor or successor could succeed on his decease by appointment of the will, such executor was allowed to transmit his office by his own will to his own executor by way of delegating the confidence originally reposed in him to the person in whom he himself confided; and thus might the executor of an executor pass on the estate in a series of appointments, until intestacy broke the chain, or the estate became finally settled and distributed.⁷ But in the American States this

¹ *Hill v. Tucker*, 13 How. (U. S.) 466. And see *Hartnett v. Wandell*, 60 N. Y. 346.

² *Barnes, Goods of*, 7 Jur. N. S. 195. *Gibbons v. Riley*, 7 Gill, 81.

³ See *Anon, Dyer*, 3 b; 1 Wms. Exrs. 250, *n.*, showing some doubt as to the effect of such a proviso; though *semble* such an appointment is inoperative.

⁴ *Bedell v. Constable*, Vaugh. 182; *Briggs, Goods of*, 26 W. R. 535. Not even to an administrator with will annexed, in the absence of express words in the grant. *Ib.*

⁵ 2 Bl. Com. 506. Otherwise *semble*, with an administrator *durante minore aetate*, for such an office stands in place of an executor. 1 Freem. 287. See comments of 1 Wms. Exrs. 7th ed. 255, *n.* And see *Grant, Goods of*, 24 W. R. 929.

⁶ 1 Wms. Exrs. 256, 284.

⁷ 1 Wms. Exrs. 7th ed. 254–256, and cases cited; *Smith, Goods of*, 3 Curt. 31; 2 Bl. Com. 506. This rule applied, though the original probate was a limited one. *Beer, Goods of*, 2 Robert. 349. A married woman as executrix

rule, which so disregards the testator's kindred and their wishes, is now quite generally changed by statute; and in consequence, the duties and liabilities of the sole executor upon his decease devolve, not upon the executor of the executor as such, but upon an administrator with the will annexed of the estate of the original testator, whose appointment is made by a court upon considerations favorable to those interested in such estate.¹ The executor of an executor cannot take the office, where the will itself provides expressly a different mode for filling vacancies as they occur;² and he may, of course, renounce the trust.³

§ 44. **Acceptance and Refusal of the Executorship; Citation of the Person named, etc.** — Having considered how the testator may appoint his executor, we next proceed to the executor's decision to take or not take the trust. For every appointment to an office there must be two parties at least; and in the first instance no one is bound to undertake private responsibilities which another seeks to fasten upon him. The office of executor is a private trust, devolving upon one individual by another's selection, and not by act of the law; and hence the office may be accepted or refused at discretion.⁴

The time of acceptance or refusal of an executorship is

might, so far as her testamentary power extended, transmit to her executor. *Birkett v. Vandercom*, 3 Hagg. 750. But it is essential to such transmission that the executor shall have probated his testator's will before his own death. *Drayton, In re*, 4 McCord, 46; 2 Wms. Exrs. 255, and cases cited.

¹ See statutes of California, Mass., Vermont, Pennsylvania, etc.; *Prescott v. Morse*, 64 Me. 422; *Scott v. Fox*, 14 Md. 388; *Farwell v. Jacobs*, 4 Mass. 634. As to jurisdiction under such statutes of an account presented by the executor of an executor against his testator's estate, see *Wetzler v. Fitch*, 52 Cal. 638. In some States the old rule appears to be still followed. *Lay v. Lay*, 10 S. C. 208; *Thomas v. Wood*, 1 Md. Ch. 296; *Crafton v. Beal*, 1 Ga.

322; *Carroll v. Connet*, 2 J. J. Marsh. 195. Where an executor who has neglected to pay a legacy has died, his executor is liable to the legatee if sufficient assets come to him from the original estate or from the estate of the first executor. *Windsor v. Bell*, 61 Ga. 671.

² *Navigation Co. v. Green*, 3 Dev. L. 434.

³ *Worth v. McArden*, 1 Dev. & B. Eq. 199.

⁴ *Lowry v. Fulton*, 9 Sim. 115; *Lewin Trusts*, 161, 162; 1 Wms. Exrs. 274. An executor cannot refuse his office in part; he must refuse entirely or not at all. 2 Koll. Rep. 132; 1 Wms. Exrs. 282; *Thornton v. Winston*, 4 Leigh, 152.

properly deferred to the date when the will comes into operation; that is to say, when the testator is dead, and the will ought to be admitted to probate and some one undertake the responsibility of settling the estate. Hence, one's promise during the lifetime of the testator to accept such trust will not conclude him.¹ Possibly circumstances might show a consideration given for such a promise, so as to involve the party refusing in a legal liability to the estate for the breach; and if a legacy was given him under the will as executor, and in consideration of such service on his part, he must needs forfeit it by his refusal to serve.² But every presumption favors a mutual postponement of one's final decision to serve until the contingency of death happens, and the person named as the decedent's executor may fitly make up his mind whether to serve or not, if, indeed, he be the survivor and capable of serving at all. And hence, as a rule, one may renounce a trust to which he is nominated under a will without forfeiting any legacy which is left to him simply as an individual, and upon no manifest requirement that he shall serve.³

The executor's acceptance of his appointment is signified by proving the will in court and taking out letters testamentary.⁴ How all this should be done will presently appear.⁵ But so important is it, in the interests of an estate, that a dead person's will should be placed promptly upon record, if he has left one, and his estate committed for settlement, that from very early times the ordinary was empowered in England to summon any person before him who had been named executor under the will of the deceased, and by summary process compel him to prove or refuse the testament; punishing him for contempt if he refused to appear;⁶ an authority which has been transferred to the new courts of probate in that country,⁷ and is exercised generally by courts of similar jurisdic-

¹ *Doyle v. Blake*, 2 Sch. & Lef. 239.

² See *Stanley v. Whitney*, L. R. 2 Eq. 418.

³ *Pollexfen v. Moore*, 3 Atk. 272; *Stanley v. Whitney*, L. R. 2 Eq. 418.

⁴ *Lewin Trusts*, 167; 3 Redf. Wills, 2d ed. 529.

⁵ See next c.

⁶ See Stats. Hen. 8, c. 5, § 8, 1 Edw. 6, c. 2, cited 1 Wms. Exrs. 274; also Stat. 53 Geo. 3, c. 127, as to punishment for contempt in the ecclesiastical court.

⁷ Act of 1857, erecting the court of probate; *supra*, § 14.

tion in the United States.¹ It is the policy of such statutes to require the person thus named to decide speedily whether he will accept or decline the trust; and in the latter event, or where he unreasonably neglects after due citation to appear, the court takes heed that the probate of the will is pursued, and thereupon commits the representation of the testator and the administration of his estate as though no such person had been named executor; or, if the will ought not to be admitted to probate, proceeds as in other cases of intestacy.² By such procedure, co-executors, or executors in succession, may be passed over, and the associate or substitute may be qualified by the court; or, instead, an administrator with the will annexed, or a general administrator, as the state of facts and legal consistency may require.³

§ 45. **The same Subject; Death equivalent to a Renunciation.** — The death of the sole executor named in the will, before having either taken or renounced probate, leaves a vacancy, whether the death occurred during his testator's life or later, which must be supplied as in case of a formal renunciation.⁴

§ 46. **The same Subject; Refusal of Record; Constructive Refusal or Acceptance.** — Probate procedure, under statutes such as we have alluded to, ought readily to establish the fact of an executor's refusal or acceptance of his office in most instances.⁵ The fact, however, should be matter of judicial supervision, and hence of judicial record. A formal renun-

¹ *Supra*, § 11.

² Stat. 21 & 22 Vict. c. 95, § 16. And see *post* as to probate appointments of executor or administrator.

³ Where an executor of a deceased executor is the rightful representative by law (see *supra*, § 43), he may thus be admitted by reason of the refusal or neglect of the co-executor. Lorimer, Goods of, 2 Sw. & Tr. 471; Noddings, Goods of, 2 Sw. & Tr. 15.

⁴ *Ib.* The executor of the executor cannot fill the office as the law usually stands at this day. *Supra*, § 43.

⁵ Statutes are sometimes quite ex-

plicit as to form. In New York, for instance, the writing should be attested by two witnesses and acknowledged or otherwise proved and filed. Redf. Sur. Pr. 141. But in Massachusetts, and some other States, the instrument is more like a simple letter to the judge. English practice dispenses, as does the American, in general, with the use of a seal. Boyle, Goods of, 3 Sw. & Tr. 426. Renunciation should be over the party's own signature; but in extreme cases the writing may be executed by an attorney. Rosser, Goods of, 3 Sw. & Tr. 490.

ciation of the trust, signed by the executor named for it and filed of record, will commonly suffice for that purpose. Such a writing or some judgment of record, reciting why the formality was dispensed with, ought, in sound probate practice, to precede the granting of letters testamentary or administration to another.¹

With such preliminaries now regularly pursued, and the removal or resignation of executors, moreover, being more readily procured in modern probate practice than when the distrusted spiritual courts exercised jurisdiction, some of the old English precedents which compelled executors to serve, to the detriment of estates, on the theory that one had constructively accepted his office, have passed into oblivion. It was formerly ruled, indeed, that if an executor had once administered at all, the ordinary had no discretion to accept his refusal and appoint another in his stead.² But the true theory, for these days, appears to be rather that if the person named as executor undertakes to administer while neglecting to prove the will, to procure his letters, and to qualify (if so the statute requires) by giving a bond, he ought to be treated as executor only so far as to be held responsible to all interested under the will, and to the court, for his unauthorized and injudicious acts; that otherwise, whether by his renunciation, resignation, or removal, a vacancy, if desired by himself or desirable on other grounds, should be declared.³ Yet, if the executor thus administering has acted in good faith, with good excuse and not injuriously, and desires to fully qualify for the office, and

¹ *Long v. Symmes*, 3 Hagg. 776; *Stebbins v. Lathrop*, 4 Pick. 33. In English practice, the person renouncing the office takes oath that he has not intermeddled with the effects of the deceased. But no such oath is required in parts of the United States, nor does it appear desirable to obstruct the issue of letters to another because of any such omission to make oath. See 1 *Wms. Exrs.* 282; *Toller*, 41, 42. Neglect to qualify may be construed under favoring circumstances into a refusal to serve. *Uldrick v. Simpson*, 1 S. C. 283.

² 1 *Wms. Exrs.* 277; 1 *Roll. Abr. Exrs. c. 2*; 1 *Mod.* 213; 1 *Leon.* 155; 1 *Salk.* 308.

³ On general principles of equity as well as at law, such a person is liable to others for his acts. *Doyle v. Blake*, 2 *Sch. & Lef.* 237; *Parsons v. Mayesden*, 1 *Freem.* 151; *Read v. Truelove*, *Ambl.* 417. And see *post* as to the executor *de son tort*. But parties aggrieved have not the security of a bond, etc., to which probate law may have entitled them.

protect his acts, this is a different thing; we speak only of a constructive acceptance, such as binds one legally to continue in office against his own will and where the court considers it detrimental to the interests of the estate. Renunciation of the trust, according to modern probate practice, is, as nearly as possible, referred to the date of proceedings for probate of the will, and made tantamount to a refusal to qualify in the probate court.¹

One who has intermeddled with the estate of the deceased, like an executor *de son tort*, may, however, as it is held, be debarred at the discretion of the court from renouncing the trust and its responsibilities afterwards, and claiming that he has not intended to serve; for the right to elect on his part, whether to accept or refuse the office, may be determined by acts and conduct on his own part amounting to an estoppel, irrespective of formal proceedings in probate. Hence, the rule, that whatever the executor does with relation to the estate of his testator, showing his intention to assume the trust confided to him, may be alleged as evidence that he had already elected to take upon him the executorship.² As where he takes possession and converts goods of the testator's estate to his own use, claiming that they belong to the estate;³ (otherwise, however, where he has claimed them as his own, since this would show an intention on his part inconsistent with administering;⁴) and where too he administers on such goods, or under some misapprehension takes a stranger's goods for that purpose,⁵ collects debts, pays claims and legacies, or even represents himself⁶ as thus pre-

¹ Renunciation held invalid in English practice, where one had intermeddled with the effects, and the record cancelled. *Badenach*, Goods of, 3 Sw. & Tr. 465. But the oath of non-intermeddling is not part of the renunciation in American as in English practice.

² Wms. Exrs. 279; *Godolph*, pt. 2, c. 8, §§ 1, 6; *Raynor v. Green*, 2 Curt. 248; *Van Horne v. Fonda*, 5 John. Ch. 388; *Vickers v. Bell*, 4 De G. J. & S. 274. As to the executor *de son tort*, see c., *post*.

³ *Ib.* Wms. Exrs. 279.

⁴ *Bac. Abr. Executors*, E, 10.

⁵ *Bac. Abr. Executors*, E, 10; Wms. Exrs. 279.

⁶ *Long v. Symes*, 3 Hagg. 771; *Vickers v. Bell*, 4 De G. J. & S. 274. But assisting a co-executor who has been duly appointed, as any attorney or agent might do, is not tantamount to electing to serve as an executor. *Orr v. Newton*, 2 Cox, 274. But *cf.* 1 P. Wms. 241, note to 6th ed., cited in Wms. Exrs. 280.

pared to act on behalf of the estate. On the other hand, a constructive refusal has sometimes been inferred by acts and omissions of the person named executor. Thus, it is held that the executor's neglect for a long time to take out letters and prove the will, when he might have done so, amounts to refusal.¹ And long delay to take such steps ought thus to be construed, in the interest of all concerned, where there has been meanwhile no intermeddling with the estate on his part, and he has not suppressed the will. Again, it may be presumed, where the same party was named executor and trustee under the will, and has qualified and acted in the latter capacity but not in the former, that he accepted the one trust and declined the other, and *vice versa*.²

§ 47. **The same Subject; Constructive Acceptance or Refusal not favored in Modern Probate Practice.** — On the whole, however, theories of constructive refusal or acceptance are hardly consistent with our modern probate practice; they may serve to establish presumptions where public records are lost, or to facilitate the course of justice in dealing with an intermeddler or an indifferent nominee, according as the interests of creditors and legatees may demand. Under both English and American statutes, at the present day, summary proceedings are available in the court of probate jurisdiction to compel the person named as executor to prove the will and qualify, and in case of his unreasonable neglect to appear to commit the trust to others just as if he had formally declined.³ Such proceedings render acceptance and refusal of an executorship matter of public record, and discourage legal inferences from acts and conduct of the nominee *in pais*.

¹ As for twelve months. *Bewacorne v. Carter*, Moor, 273. For twenty years. *Marr v. Play*, 2 Murph. 85.

² See *Williams v. Cushing*, 34 Me. 370; *Deering v. Adams*, 37 Me. 264. A judge of probate named as one of the executors under a will, shows, by acting as judge in admitting the will to probate and qualifying the co-executors, that he declines to serve. *Ayres v. Weed*, 16

Conn. 291. Refusal to act as executor may be implied without record evidence or express declaration. *Solomon v. Wixon*, 27 Conn. 291; *Thornton v. Winston*, 4 Leigh, 152; *Ayres v. Clinefelter*, 20 Ill. 465; *Uldrick v. Simpson*, 1 S. C. 283.

³ See 21 & 22 Vict. c. 95, § 16; *Wms. Exrs.* 275.

Responsible as an executor may be for his acts and negligence respecting the trust before he has been duly qualified, modern policy disinclines to force one to serve as executor against his will or regardless of the true welfare of the estate, provided there are others at hand competent and ready to assume the management. Such trusts, in the United States at least, being now compensated, the office of executor becomes far less burdensome than in old times when one was selected to perform these pious duties as a last favor to his dying friend. And while, as matter of general law, one who has proved the will, received letters testamentary, and fully qualified in court, cannot afterwards renounce the executorship of his own accord or divest himself of its duties,¹ our local statutes now provide that executors, as well as administrators, may afterwards resign or be removed from office, when in the discretion of the probate court it appears proper.² One's renunciation has been accepted in some instances after probate of the will but before qualification;³ and if a bond with sureties must be furnished under the local statute, the inconvenience of furnishing a bond such as the court requires may furnish good reason for renouncing at the last moment.

§ 48. **Executor's Right to Renounce not to be exercised Corruptly, nor for Sinister Objects.**—An agreement made with persons in interest before a testator's death, and contrary to his expressed wishes, by one named as executor, to renounce the executorship for a stated consideration, is contrary to public policy and void.⁴ Nor has one named as executor any right, by mispleading or acquiescence in the unfounded claim

¹ *Sears v. Dillingham*, 12 Mass. 358; *Washington v. Blunt*, 8 Ired. Eq. 253.

See also *Newton v. Cocke*, 10 Ark. 169.

² Thus is it in Massachusetts and New Hampshire. *Thayer v. Homer*, 11 Met. 104; *Morgan v. Dodge*, 44 N. H. 258. Nor need the appointment of a successor await the settlement of the outgoing executor's accounts. *Harrison v. Henderson*, 7 Heisk. 315. As to resignation and removal of executors and administrators, see c. 6, *post*.

³ *Miller v. Meetch*, 8 Penn. St. 417; *Davis v. Inscoc*, 84 N. C. 396. The particular form of renunciation is not important. *Commonwealth v. Mateer*, 16 S. & R. 416. But the New York statute requires renunciation to be formally executed in presence of witnesses. 2 N. Y. R. S. § 370.

⁴ *Staunton v. Parker*, 26 N. Y. Supr. 55.

of another, to change the lawful course of substitution or administration in his stead.¹

§ 49. **Whether an Executor renouncing may exercise a Power.** — Williams, in his excellent work on executors and administrators, doubts whether, where a power is given to executors, they may renounce probate, and, at the same time, exercise the power, unless the power was conferred upon them personally and without reference to the office of executor.² But he admits that some eminent authorities point to the contrary conclusion.³

§ 50. **Retraction after a Renunciation; Subsequent Appointment of the Executor.** — Where an executor upon his own petition has been excused from the office, and has formally renounced the trust, he cannot, after the issuance of letters to another, retract his renunciation at pleasure. His election once made, is, for the time being, irrevocable.⁴ But a fresh opportunity may often be afforded him to take the trust, should a vacancy in the office afterwards occur. As, where the co-executor named under the will qualified alone and was afterward removed for statute cause, or died;⁵ or in case the person renouncing in the first instance was named sole executor and sole legatee in the will, and administration with the will annexed had been granted upon his renunciation to one

¹ *Nelson v. Boynton*, 54 Ala. 368.

² *Wms. Exrs.* 286, 287.

³ *Sugden Powers*, 138, 6th ed.; 2 *Prest. Abstr.* 264. *Perkins*, No. 548, suggests the point of distinction as Mr. Williams has taken it. And see *Keates v. Burton*, 14 Ves. 434, *per* Sir Wm. Grant. It should be admitted that one who is executor or administrator under a will has by no means the power of selling the testator's real estate, by inference. See *Clark v. Tainter*, 7 Cush. 567. One may therefore have the power to sell conferred upon him as something not annexed to the will or his acceptance or declination of the executorship.

Mr. Williams's distinction appears, therefore, to this writer a just one in the sense that the testator's intention should be resorted to in such a case.

⁴ *Thornton, Goods of*, Add. 273. *Trow v. Shannon*, 59 How. (N. Y.) Pr. 214. The old practice was more favorable to permitting those who had once refused to come in afterwards and act. *Wms. Exrs.* 284; 4 M. & Gr. 814, *per* Tindal, C. J.

⁵ 1 *Robert.* 406; *Codding v. Newman*, 63 N. Y. 639; *Perry v. DeWolf*, 2 R. I. 103; *Maxwell, In re*, 3 N. J. Eq. 611; *Davis v. Inscoc*, 84 N. C. 396.

of the next of kin who presently died insolvent and intestate.¹ In the former instance, letters of administration never having issued, before the executor's retraction took place, letters testamentary would be properly issued to him ; but, in the latter, administration has once been granted, and consequently the executor properly takes instead administration *de bonis non*, with the will annexed. Administration with the will annexed having once been duly granted, in fact, there would be no further opportunity left to the renouncing party to qualify as executor ; and yet, under the broad discretion of the court, where a new administrator upon an unadministered estate has to be appointed, a sole legatee may well be pronounced in such an exigency the best suitable for the trust, and be appointed to the vacancy accordingly as an administrator.²

In practice, an executor's retraction of his refusal has been treated with considerable indulgence, so long as no other grant of letters supervened. Thus, upon consent of all the parties interested (though not otherwise) an executor who had refused the trust in order to become an admissible witness for sustaining the validity of the will, was in the English spiritual court regularly allowed to withdraw his refusal after the suit was over and receive letters testamentary ;³ palpable evasion, though this might be, of the rule which forbade interested persons to testify in court. And even supposing letters of administration to have issued, if this were upon some misapprehension or error deserving correction, or for some temporary purpose not inconsistent with probate, and before the executor can be said to have refused the trust, this party may have the administration revoked or superseded and letters testamentary issued to him ; as, for instance, should a will turn up after the grant of letters, as upon an intestate's estate, or after a special administration.⁴ This power of retraction

¹ Wheelwright, Goods of, L. R. 3 P. D. 71.

² See *c. post* as to administration ; 1 Wms. Exrs. 283. Cf. Thornton v. Winston, 4 Leigh, 152.

³ 1 Wms. Exrs. 7th ed. 283; McDonnell v. Prendergast, 3 Hagg. 212, 216; Thompson v. Dixon, 3 Add. 272.

Retraction allowed at any time before the grant of letters to another. Robertson v. McGloch, 11 Paige, 640.

⁴ Taylor v. Tibbatts, 13 B. Mon. 177; 2 Wms. Exrs. 283. Under the old and defective English practice in such matters, an executor who had neither actually nor constructively renounced his

within such limits is matter of right, and not of mere privilege.¹

§ 51. **Renunciation where Several Executors are named.** — Where two or more are named co-executors under a will, all must duly have renounced or have defaulted upon citation to the same result, before the will can be treated as in effect a will without an executor, so as to be properly committed to an administrator with the will annexed. The refusal of one co-executor does not exclude the others, nor prevent succession, institution, or a sole execution of the trust, as the testator's wishes or the just interests of the estate may require. And although, as we have already indicated,² a co-executor who has renounced the office may afterwards retract the renunciation so as to succeed to a vacancy should one occur (for, here, the situation of the trust having changed, one does not stultify himself by recalling his refusal), the better practice allows the co-executor's refusal to slumber on unless he chooses to arouse it before the opportunity be past.³ One of the co-executors having renounced, letters will be granted to the remaining executor,⁴ and, unless it appears to the court imprudent, to him alone.

§ 52. **Executors, how appointed by the Court; Letters Testamentary.** — This chapter has shown us that executors are ap-

pointment, but had merely defaulted to come in on citation and prove the will, might at any future time appear to prove the will, obtain letters testamentary, and have the administration revoked. 1 Leon. 90; Godolph, pt. 2, c. 31, § 3. But the policy of later legislation is (requiring probate of the will as of course) to treat the executor named as such who does not respond to the citation, but neglects inexcusably to appear and perform his duty, as having forfeited all right to the executorship. 21 & 22 Vict. c. 95, § 16.

¹ Casey v. Gardiner, 4 Bradf. 13.

² Supra, § 50.

³ Judson v. Gibbons, 5 Wend. 224. It was formerly thought that the grant of administration would be void upon

such a vacancy in the office unless the executor surviving renounced the trust once more in due form. But this super-serviceable regard for a testator's wishes is not approved by the later and sounder authorities, which hold that the surviving executor must come in, retract his renunciation, and ask to be appointed before administration *de bonis non* passes the seals, if he would supply the vacancy. 1 Robert. 406; 1 Wms. Exrs. 285; Venables v. East India Co., 2 Ex. 633.

⁴ Miller v. Meetch, 8 Penn. St. 417. An executor who renounces, being a creditor of the estate, is not debarred of the usual remedies of creditor. Rawlinson v. Shaw, 3 T. R. 557.

pointed, or rather designated, by the testator's will. The full appointment, according to modern English and American practice, comes from the court of probate jurisdiction, which, recognizing and confirming the testator's selection, clothes the executor therein named with plenary authority by issuing letters testamentary to him. Letters testamentary are granted usually in connection with decreeing the probate of the will; and, as our next chapter will show, one's last testament should be presented for probate, whether the executor named be willing to serve and competent for the trust or the reverse. A will is not necessarily executed by an executor, nor dependent for enforcement of its provisions upon any survivor of the deceased. Hence, according to our present probate procedure, an executor derives his office (1) from a testamentary appointment, which (2) is confirmed by a decree of the probate court, and the issue of letters testamentary to him accordingly.

CHAPTER II.

PROBATE OF THE WILL.

§ 53. **Duty of producing the Will; Fundamental Importance of determining Testacy or Intestacy, etc.**—The first and most pressing duty of every executor nominated as such is to have the will, by virtue of which he claims the rights of representative, admitted to probate. And so fundamental to jurisdiction upon the estate of a deceased person is it to ascertain whether such person has died testate or intestate, and if testate, what was his last will and testament, what instrument, in truth, made and subscribed by him with due formalities while capable and free to exercise the momentous power of testamentary disposition, embodied his latest wishes; so important is it to know whether he has chosen in fact to have his property settled and distributed according to his own scheme, or to let the law of intestacy operate, that the personal claim of this or that individual to execute or administer the estate is but secondary in importance.

Hence the will, whoever may be its temporary custodian, should be properly produced in court after the testator's death, in order that its validity may be finally determined, and incidentally the rights of all persons claiming a title and interest in the decedent's estate. The executor named in the instrument is the most suitable person for such temporary custody and formal production. But wills are sometimes received, under appropriate statutes, from such as may have chosen during lifetime to deposit the same confidentially in the probate registry; or the instrument is committed to the care of an attorney, or some confidential friend; or it is lodged among one's effects or business papers, so that some member of the family, a partner, or a business clerk, may happen first to light upon it; or perchance it may have been carelessly or artfully placed where only accident is likely to

discover it, and the finder may prove an utter stranger. In any and all of these situations, and under whatever other circumstances the will, or what purports to be the will, of a party deceased may be found, the custodian, come he casually or rightfully into possession, is bound to produce and surrender it in such a manner that, in all reasonable expectation, it shall duly and speedily be brought before the proper tribunal having probate jurisdiction of the estate. He must not clog the surrender of that instrument with conditions of pecuniary reward; he must not connive with others at its suppression or concealment; he must not act as though the paper belonged to himself, or to any particular person interested in the estate, or even to the executor named himself; but treat it as a document which involves the rights of all concerned in the estate, should either its validity or invalidity be established, and of those, besides, who should properly manage and settle the estate in one contingency or the other, as an instrument whose possession for the time being casts upon him a perilous responsibility. Most custodians may well, doubtless, surrender the paper to the executor named therein; but the duty does not cease here; and by fair and seasonable notice, if prudence and good faith so require, to the nearest relatives of the deceased, or others interested, and giving the fact that the instrument has been found due publicity, one should procure what the policy of the law now requires, its production for probate before the proper tribunal.¹

§ 54. **Procedure against Persons suspected of Secreting, Destroying, etc., the Will.**—Local statutes in modern times quite generally affix criminal penalties to the intentional suppression, secretion, or destruction of a dead person's will by any one acquiring possession thereof.² They provide also for summary proceedings in the probate court against any person having or suspected of having, or knowing as to the whereabouts of such an instrument; such proceedings being

¹ An attorney or solicitor, the custodian of a will, cannot refuse its surrender for probate upon any claim of a lien for unpaid fees. *Balch v. Symes*, Turn. & Russ. 87. And see 3 Redf. Wills, 3d ed. 1, 2.
² *Smith Prob. Pract. (Mass.)* 59; *Stebbins v. Lathrop*, 4 Pick. 33.

in the nature of an inquisition, so that one is cited to appear and either surrender the will or purge himself by answering under oath such lawful questions as may be propounded in the premises. Independently of such legislation, according to correct reasoning, every court of competent probate jurisdiction has a lawful authority, inferable from its peculiar functions, to summon parties spontaneously or upon the petition of any person interested, for the purpose of compelling production and investigating the whereabouts of instruments which ought to be offered before such court for probate, and may commit for contempt those who refuse to obey its mandate.¹ Where one is shown to have had the custody of a will, he is presumed to retain it and must clear himself upon oath, or else be held responsible for its non-appearance; and any person having knowledge as to the existence or place of deposit of the will ought to give his testimony freely.²

§ 55. **Death of Testator; its Effect upon his Will** — Every instrument purporting to be one's last will and testament has (except in a few special instances stated in the books) but an inchoate, incomplete, and ambulatory operation during the life of the person who makes it; changes may be made by his codicil afterwards; moreover, he may cancel and destroy such instruments at pleasure, execute a later will, or conclude to dispense with a will altogether; provided only that he remains of sound mind and capacity, and exercises his unfettered choice concerning the final disposition of his estate. But the moment one dies, the instrument or instruments, if any, which he has left duly executed, constitute his last will and testament, and will acquire conclusive force and operation as such; and to prove and establish what purports to be such last will and testament, so that it may fully ope-

¹ 3 Redf. Wills, 3d ed. 6; Cas. temp. Lee, 158; Swinb. pt. 6, c. 12, pl. 2; Brick's Estate, 15 Abb. Pr. 12.

² A Massachusetts statute requires every custodian of a will, within thirty days after the notice of the death of the testator, to deliver it into the probate court which has jurisdiction of the case

or to the executors named in the will. For neglect to do so, without reasonable cause after being cited for that purpose, he may be committed to jail, and will be held further liable in damages to any party aggrieved. Mass. Gen. Stats. c. 92, § 16.

rate, or, more generally, to ascertain whether, in a legal sense, any last will and testament was left at all, becomes, in the first instance, the peculiar province of the local probate court of his last domicile; and, besides, the full appointment and qualification of the person or persons who, according as he died testate or intestate, may be entitled to manage and settle the estate and represent the deceased.¹

The fact of the testator's death, superadded to that of last domicile,² is thus essential to our modern probate jurisdiction. Death is frequently a fact so well known in the neighborhood, that the court requires no proof; often it is assumed from the allegations of the petitioner for probate and letters; and familiar rules of evidence may be adduced as to presumptions of death after a long absence, usually seven years, without being heard from.³ But presumptions of death are only for convenience; and if the person on behalf of whose estate proceedings were taken had not actually died, probate of the will may be afterwards annulled; inasmuch as there is no jurisdiction in the court over the property of the living,⁴ nor positive assurance that a particular will embodies the maker's final disposition of his property, nor certainty where he may actually reside at the time of his death.⁵

¹ 3 Redf. Wills, 3d ed. 1, 2; Wms. Exrs. 7th ed. 6, 10, 319. We have seen that one's will may be received for deposit under suitable English and American statutes, at the registry of wills, while he is alive. *Supra*, § 53; 2 Wms. Exrs. 319. Such statutes, however, only provide a convenient place of deposit. The testator, having the right to revoke, may withdraw the will, whenever he desires, from such custody, during his lifetime.

The earlier English books, however, make mention of proceedings which a living testator might invoke on his own petition; the effect of which was to have the will duly recorded and registered among other wills. But proof so adduced had not the effect of probate, nor could authentication under seal issue

during the testator's life. The proceeding was simply precautionary against loss of the instrument, and could not impair the testator's right to alter or subsequently revoke. See Swinb. pt. 6, § 13, pl. 1.

² *Supra*, § 15.

³ See *supra*, pt. 1; 2 Greenl. Evid. § 278, as to presumptions and proof of death. Death is presumptively established as a fact by production of the probate of his will before a surrogate, and the proceedings had upon such probate. *Carroll v. Carroll*, 6 Thomp. & C. 294.

⁴ *D'Arusement v. Jones*, 4 Lea, 251.

⁵ 1 Bl. Com. 502. "Nam omne testamentum morte consummatum est; et voluntas testatoris est ambulatoria usque ad mortem." Co. Litt. 112.

§ 56. **How soon after the Testator's Death should the Will be presented for Probate.**—The time after the testator's death when his will should be presented for probate must depend somewhat upon sound discretion; distance, the facility of procuring witnesses and needful testimony, and the convenience of the executor and parties interested, being circumstances of no little consequence in this connection. Decency requires delay until after the burial has taken place; but, as a rule, the will of a deceased person should be produced for public custody as soon after the funeral as possible; whether this be in open court, or by first filing the instrument with the register, in order that citation may issue for probate later at some convenient court day, as in conformity with local practice. The opportunity for a postponement of the judicial hearing for probate will suffice for most purposes of further delay; production of the instrument by its individual possessor affording to the court the needful primary pledge of good faith. For delaying production of the instrument is one thing, and delaying proof of the authenticity and the issuing of letters another. English and American statutes accord in affording reasonable time and opportunity to all interested in this latter respect; while, as to the former, discouraging every species of delinquency.¹

But, however late, from one cause or another, probate may have been delayed, the better practice, in the absence of a positive statute of limitations, is to admit the will on due proof, at any time, to probate;² though the authenticity of

¹ English practice requires an explanation of the delay where one seeks probate or administration, after the lapse of three years from the death of the deceased. 1 Wms. Exrs. 320. On the other hand, no probate or letters shall issue within seven days from the death of the party deceased. *Ib.* American practice and the tenor of statutes, English and American, requiring a will to be produced from private custody, and forbidding all intermeddling with an estate without a judicial appointment, all tend to hasten the presentment of the will for

probate. The Eng. Stat. 55 Geo. III. c. 184, imposes a penalty for administering without proving within six months. 1 Wms. Exrs. 319. Thirty days' delay after knowledge of the death in producing the decedent's will is all that the policy of some American statutes appears to tolerate. Mass. Gen. Stats. c. 92, § 16.

² A will may be probated in Massachusetts more than twenty years after the testator's death, for the purpose of establishing title to real estate; although original administration be confined by statute to twenty years. *Shumway v.*

ancient instruments, whose establishment would tend to disturb estates long settled in good faith, ought only to be admitted upon the clearest testimony.

§ 57. **Primary Probate Jurisdiction depends upon Last Domicile of Deceased; Foreign Wills.**—Jurisdiction over the probate of wills, as over the settlement generally of the estates of those dying testate or intestate, is determined primarily by the last domicile of the person deceased.¹ And such jurisdiction being usually entertained by counties, parishes, or districts, both in England and the American States, it follows that the county, parish, or district probate court of the testator's last domicile has exclusive original authority to pass upon the validity of instruments purporting to constitute his last will, to admit or deny probate of the same, and to grant letters as for testacy or intestacy. Of foreign executors and administrators, and their powers, we shall have occasion to speak later; but it should be here observed that the probate jurisdiction, rightfully taken in the proper county or district, has full domestic operation in the State or country of the testator's last domicile, and gives to the executor or administrator a corresponding authority to be rightfully exercised. And if foreign letters and authority be needful for facilitating a settlement of the estate, where suit must be brought abroad, or part of the property is there situated, the first requisite is to probate the will, if there be one, and procure letters testamentary within the proper domestic jurisdiction. The filing of a copy of the probate of such will, or its duly attested record serves, in the foreign probate registry—with, perhaps security given or ancillary letters procured besides in the foreign jurisdiction—the purpose needful, according as the foreign statute in question may prescribe.²

Holbrook, 1 Pick. 114; *Waters v. Stickney*, 12 Allen, 12. See *Van Giesen v. Bridgford*, 18 Hun (N. Y.) 73.

¹ *Supra*, § 15; 3 Redf. Wills, 2d ed. 12, 13.

² *Hood v. Lord Barrington*, L. R. 6 Eq. 218; *Carpenter v. Denoon*, 29 Ohio St. 379; *Campbell v. Sheldon*, 13 Pick.

8; *Ives v. Allyn*, 12 Vt. 589; *Bromley v. Miller*, 2 Thomp. & C. (N. Y.) 575; *Porter v. Trall*, 30 N. J. Eq. 106. Local domestic statutes usually provide for filing an authenticated copy of one's will, for domestic convenience, in case of a deceased non-resident, the same having been duly probated in the State

The will of a person domiciled in a certain county and State or country, should be admitted to original probate in the domestic jurisdiction, without regard to the place where the will was made or where such person happened to die.¹ And the judgment of the local court having original jurisdiction ought to be held conclusive as to the probate, unless vacated by proceedings on appeal, or impeached by direct proceedings for setting the probate aside.² One may make a will designed to operate upon property in one country and another will for property in another country.³

§ 58. **Testamentary Papers Ineffectual until after Proper Probate; Probate relates back.**—In general, the necessity of a probate is fully sustained by modern practice in England and this country. The production of what purports to be a will can be of no legal force in the courts, however ancient the documents, without this public record and seal of authenticity; and neither the temporal courts in England, nor the courts of law and equity in the United States, will take cognizance of the testamentary papers, or of the rights dependent on them, until after their proper probate.⁴

Probate, however, having been duly procured, the probate is said to relate back to the time of the testator's death; and this, apparently, for the convenience of the executor or of the administrator with the will annexed to whom letters there-

or country of his last domicile. But such authentication of a foreign probate is inadmissible if it appears that the testator was domiciled here instead of abroad, at the time of death; for in such case there should have been original probate here. *Stark v. Parker*, 56 N. H. 481; *Converse v. Starr*, 23 Ohio St. 491. As to the mode of exemplification of a foreign will in New York practice, with petition by one as agent or attorney of the foreign executor to receive letters in his stead, see *Russell v. Hartt*, 81 N. Y. 19.

¹ *Converse v. Starr*, 23 Ohio St. 491. And see *supra*, § 21.

² *Williams, Re*, 1 Lea, 529.

³ *Astor, Goods of*, L. R. 1 P. D. 150.

⁴ *Rex v. Netherseal*, 4 T. R. 258; 3 Redf. Wills, 12; *Strong v. Perkins*, 3 N. H. 517; *Wood v. Mathews*, 53 Ala. 1; *Pitts v. Melser*, 72 Ind. 469. A will not regularly probated cannot be used to establish title to lands devised. *Willamette Falls Co. v. Gordon*, 6 Oreg. 175.

But in some States, contrary to rule, it appears to be considered that probate is not essential to the validity of the will, and that rights may be protected by showing its validity in any court. *Arrington v. McLemore*, 33 Ark. 759. The fact that a will has not yet been proved does not prevent a devisee of lands or a party under him from bringing ejectment. *Richards v. Pierce*, 44 Mich. 444.

upon issue; in order that his title and rightful authority may be adequate for the proper management and settlement of the estate, and so as to protect needful acts on his part prior to the probate.¹

§ 59. **What Testamentary Papers require Probate; Wills of Real and Personal Property.**—It is laid down in the older English books, that if an instrument be testamentary, and is to operate on personal property, probate must be obtained whatever its form; but that a will which clearly respects lands alone ought not to be probated; while, if the will was a mixed will, concerning both land and personal property, probate is proper, though such probate is without prejudice to the heirs of the land.² But such cardinal distinctions, which the English chancery asserted somewhat jealously against the ecclesiastical courts in times past, with the intent of confining the spiritual jurisdiction as closely as possible to goods and chattels, is materially done away, under the Court of Probate Act of 1857, which, seeking to prevent the mischief of double trials of proof of the same will, requires heirs, devisees, and parties in interest, to be cited in wherever the formal probate of a will is to affect real estate, and declares that such course having been pursued, the probate decree, establishing the will as valid, shall bind all such parties.³

In most parts of the United States discrimination between wills of real and of personal property is abolished, and by appropriate statute it is expressly provided that no will,

¹ 1 Wms. Exrs. 293; 9 Co. 38 a; Plowd. 281; *Ingle v. Richards*, 28 Beav. 366; *Hood v. Lord Barrington*, L. R. 6 Eq. 218, 224.

² 1 Wms. Exrs. 388, 389; 3 Salk. 22; 2 Salk. 553. It is admitted, too, that where executors are nominated in a will purporting to dispose of lands alone, the document should be probated. *O'Dwyer v. Geare*, 1 Sw. & Tr. 465; *Barden, Goods of*, L. R. 1 P. & D. 325. And so, wherever there is doubt whether the will concerns land or not, since probate may be needful in such cases and can do no harm. 1 Phillim. 8, 9.

³ 1 Wms. Exrs. 341, 388; Act 20 & 21 Vict. c. 77, § 64 (1857). The effect of the old English practice was to require the registrar of probate to attend the temporal court whenever in a suit involving title to land proof of a devise was needful under a mixed will already admitted to probate. Chancery regularly enforced such production from the registry, though Lord Eldon expressed his surprise that such a jurisdiction should have been exercised. 1 Wms. Exrs. 390, 391; 1 Atk. 628; 6 Ves. 134, 802; 7 Ves. 292.

whether of real or personal estate, shall be effectual to pass the same, unless it has been duly proved and allowed in the probate court; and the probate of a will devising real estate shall be conclusive as to its due execution in like manner as of a will of personal estate.¹ The uniform practice, moreover, of American probate courts is to issue a citation to all heirs, next of kin and parties interested, before any will is admitted in solemn form to probate, whether the testator's estate consist of real or personal property or both together.²

§ 60. **Testamentary Papers requiring Probate; Various Kinds stated; Wills, Codicils, etc.** — All codicils ought to be presented for probate, together with the original will; and this even though a particular codicil contains no disposition of property, but simply revokes all former wills.³ Indeed, every testamentary paper should be presented at whatever time discovered, whether before or after a regular probate, and whether it merely confirms the will already proved, or, on the other hand, wholly or partially revokes it.⁴ A paper, it is said, which disposes of no property, has, generally speaking, no testamentary character so as to enable probate thereof to be granted.⁵ Yet a will might have been executed for the express purpose of designating executors, and on that account

¹ *Shumway v. Holbrook*, 1 Pick. 114; 1 Wms. Exrs. 293, note by Perkins; Mass. Pub. Stats. c. 127, § 7; *Wilkinson v. Leland*, 2 Pet. 655; *Bailey v. Bailey*, 8 Ohio, 245.

² Local peculiarities do not affect the general rule in this country. Under the law of Louisiana it appears that the probate of a will is not conclusive against parties in possession of property which the executor seeks to recover against them unless they were parties litigant in the probate proceedings. And when the validity of a will is brought in question incidentally on a question of title to property, it is open for investigation in any court in which the title may be litigated. *Fuentes v. Gaines*, 1 Woods, 112. In Tennessee a will not sufficiently attested to pass realty may be established

as to personalty. *Davis v. Davis*, 6 Lea, 543. See *Hegarty's Appeal*, 75 Penn. St. 503. And in the codes of some southern States, fewer witnesses are required to a will of personal than one of personal property; a will in the testator's own handwriting being likewise favored specially as to attestation. Wms. Exrs. 67, note by Perkins; *post* as to subscribing witnesses.

³ *Brenchley v. Still*, 2 Robert. 162; *Laughton v. Atkins*, 1 Pick. 535.

⁴ *Weddall v. Nixon*, 17 Beav. 160. As to the proper steps to be taken for establishing a will later in date found after the decree of probate, see *Harrison v. Every*, 34 L. T. 238.

⁵ *Van Straubenzee v. Monck*, 3 Sw. & Tr. 6.

alone deserve admittance to probate.¹ Of two or more conflicting testaments it may be needful to determine which one remains in force by way of later revocation, or whether different papers deserve probate as together containing the last will of the deceased.² And a will may be properly admitted to probate even though it take effect in certain provisions only, and is void as to others.³

A will which is made in execution of a power requires to be propounded for probate like any other will,⁴ subject to what we have said concerning wills which relate to real estate only.⁵ But a paper executed as a last will, which does no more than to name a guardian for one's children, and neither disposes of property nor designates an executor, is not entitled to probate.⁶

§ 61. **Testamentary Papers requiring a Probate; Secret Wills; Extraneous Documents referred to.** — Sealed packets, directed by a testator to be delivered by the executor to persons unopened, cannot, consistently with a rightful settlement of the estate upon a representative's official responsibility, be so delivered; but the packets may be opened in court and the directions receive probate or not, according to the circumstances; the usual reservation as to a sufficiency of assets applying, of course, if the contents are to go as legacies.⁷ The civil law appears to have provided a special form of probate for closed testaments; but with us no testamentary disposition can be valid and at the same time secret in the sense

¹ See *Barden, Goods of*, L. R. 1 P. & D. 325; 1 Wms. Exrs. 227, 389; *Lancaster, Goods of*, 1 Sw. & Tr. 464; *Miller v. Miller*, 32 La. Ann. 437.

² See *Hughes v. Turner*, 4 Hagg. 30; *Morgan, Goods of*, L. R. 1 P. & D. 323.

³ *George v. George*, 47 N. H. 27; *Bent's Appeal*, 35 Conn. 523; 38 Conn. 26.

⁴ *Goldsworthy v. Crossley*, 4 Hare, 140; *Hughes v. Turner*, 4 Hagg. 30; *Tattall v. Hankey*, 2 Moore, P. C. 342.

⁵ 4 Hagg. 64; *supra*, § 59.

⁶ *Morton, Goods of*, 3 Sw. & Tr. 422.

But *q. u.* whether this holds true in States where the probate court has original jurisdiction in the appointment of guardians as well as executors.

A testator who changes his will from time to time during his life, would do well to guard against multiplying documents for presentation to probate. It is generally a good rule to make a new instrument, complete in its provisions, and destroy all previous ones.

⁷ *Pelham v. Newton*, 2 Cas. temp. Lee, 46.

of evading successfully the scrutiny of a probate court or a public registration after the testator's death, for the convenience of all parties interested.¹

But extraneous documents may be referred to in a will by way of regulating details in the manner of disposition ; over which documents the testator and his representatives and the court of probate can gain no control. Thus, sole probate may be made of a will which directs a settlement of the estate after the manner of some will probated in a different jurisdiction, or according to the trusts in a certain deed which those entitled to possession refuse to give up or have copied.²

§ 62. **Instruments which do not purport to be Testamentary.**—Equity will uphold a paper sometimes as a declaration of trust by one deceased, though the same be not entitled to proof as a will.³ The memorandum of an intended will not duly executed has also been admitted in the English probate out of respect to the testator's manifest intention.⁴ But a wiser policy should check any such inclination in the courts ; for under our modern jurisprudence the evil is far less of distributing an estate among kindred as intestate than in curtailing their equal rights under any disposition which falls short of the testamentary attributes. It is held that, in various instances, if a testator refers in his duly executed and attested will to another paper which has already been written out, clearly and distinctly identifying and describing it, so that it may safely be incorporated in so solemn a disposition,

¹ See Swinb. pt. 16, § 14, pl. 1 ; Godolph, pt. 1, c. 20, § 4.

² Sibthorp, Goods of, L. R. 1 P. & D. 106. Where another such will or document is referred to, it is fair, wherever practicable, to have an authenticated copy thereof filed in the registry, without incorporating it in the probate. Astor, Goods of, L. R. 1 P. & D. 150. Here there were found an English will and codicils, designed for English property, and an American will with nine codicils for disposing of property in America.

³ Smith v. Attersoll, 1 Russ. 266 ; Inchiquin v. French, 1 Cox, 1.

⁴ Torre v. Castle, 1 Curt. 303 ; s. c., on appeal, 2 Moore, P. C. 133. But, as Williams has observed, such a paper was not regarded as an actual testamentary disposition, but as fixed and final instructions which sudden death alone prevented the writer from executing in due form. 1 Wms. Exrs. 109, 110 ; Barwick v. Mullings, 2 Hagg. 225 ; Hattatt v. Hattatt, 4 Hagg. 211.

that paper should be probated as part of the will itself. But a later or even a contemporaneous writing, having the character of a mere letter of instructions to one's executors, and not being executed and attested as the law requires, can have no testamentary obligation, and should not be admitted to probate;¹ and, in general, an extraneous unattested writing, to be incorporated with the will itself, should be reasonably identified by reference as part of it and as existing when the will was executed.¹

§ 63. **Modern Laxity as to Papers of a Testamentary Character corrected by Statutes requiring Attestation, etc.**—All papers, however, which one may have executed with the formalities requisite by the law of his last domicile, and which purport, moreover, to dispose of any or all of his estate upon his decease, ought to be presented to the probate court for such decision as may be proper concerning their testamentary character. And the modern English decisions, prior to statutes of Victoria's reign, show a very liberal, not to say lax, course of dealing with wills of personal property in this respect,² the ancient rule having been comparatively stringent. Thus the intended exercise of a power might legally operate

¹ *Lucas v. Brooks*, 18 Wall. 436; *Zimmerman v. Zimmerman*, 23 Penn. St. 275; *Ludlum v. Otis*, 15 Hun (N. Y.) 410; *Sibthorp, Goods of*, L. R. 1 P. & D. 106; *Bizzey v. Flight*, 3 Ch. D. 269. In *Newton v. Seaman's Friend Society*, 130 Mass. 91, the English and American rule with its qualifications is succinctly stated by Gray, C. J. "If a will, executed and witnessed as required by statute," observes this judge, "incorporates in itself by reference any document or paper not so executed and witnessed, whether the paper referred to be in the form of a will or codicil, or of a deed or indenture, or of a mere list or memorandum, the paper so referred to, if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof as the paper referred to therein, takes

effect as part of the will, and should be admitted to probate as such. *Allen v. Maddock*, 11 Moore, P. C. 427; *Singleton v. Tomlinson*, 3 App. Cas. 404; *Jackson v. Babcock*, 12 Johns. 389; *Tonnele v. Hall*, 4 Comst. 140; *Chambers v. McDaniel*, 6 Ired. 226; *Beall v. Cunningham*, 3 B. Mon. 390; *Harvy v. Chouteau*, 14 Mo. 587."

² "There is nothing that requires so little solemnity as the making of a will of personal estate, according to the ecclesiastical laws of this realm; for there is scarcely any paper writing which they will not admit as such." *Per* Lord Hardwicke in *Ross v. Ewer*, 3 Atk. 163. Before the operation of stat. 1 Vict. c. 26, no solemnities were needful for a will of personal property. 4 Wms. Exrs. 7th ed. 66.

as a will.¹ A memorandum of present trust for the use of A. after one's decease, accompanied by delivery of the property, might be regarded as testamentary.² Deeds, bonds, letters, marriage settlements, bills of exchange, promissory notes, and even the endorsement upon a negotiable instrument, might operate to confer a legacy, and so far as its tenor justified, to establish a last testament.³ And in both England and the United States, it must be considered the rule of the present day, by a great preponderance of authorities, that the form of a will is by no means essential to its testamentary character; for if the writing or writings, duly witnessed, establish an intent to operate a disposal, in whole or in part, of one's estate upon the event of his decease, a probate is proper.⁴ Hence the inference, likewise supported by abundant citations, that even though one may have intended to dispose by some instrument of a different sort, and not by a will, yet his disposition being incapable of taking effect in the one shape, it might take effect in the other; for, as the person had, if not the mind to make a will, the mind, nevertheless, to dispose in such manner as wills operate, his intention may well be executed.⁵

¹ Southall v. Jones, 1 Sw. & Tr. 298. And so as to a power of attorney. Rose v. Quick, 30 Penn. St. 225.

² Tapley v. Kent, 1 Robert. 400.

³ See 1 Wms. Exrs. 104, 105, and numerous cases cited; 1 Redf. Wills, 2d ed. 167; Passmore v. Passmore, 1 Phillim. 218. That the modern rule is even more dangerously lax with respect to establishing gifts *causa mortis* of incorporeal personalty, see 2 Schoul. Pers. Prop. 182.

⁴ 1 Wms. Exrs. 7th ed. 104-107, and numerous cases cited; also Perkins's n. to ib.; 1 Redf. Wills, 167.

⁵ 1 Wms. Exrs. 104-107; Masterman v. Maberly, 2 Hagg. 247; Morgan, Goods of, L. R. 1 P. & D. 214; 1 Redf. Wills, 167. Where one makes a deed to take effect only on his death, this has been sustained sometimes as a deed where insufficiently executed to serve as

a will. Moye v. Kittrell, 29 Geo. 677. As to whether an instrument, invalid as a deed, but intended to operate as such, can take effect as a will, the English rule is very subtle, as our text indicates. See *contra*, Edwards v. Smith, 35 Miss. 197.

Papers which are not on their face of a testamentary character require to have the *animus testandi* proved; while a regular paper speaks for itself on that point. Thorncroft v. Lashmar, 2 Sw. & Tr. 794. An instrument manifestly executed as a will is to be admitted to proof without considering its effect. Taylor v. D'Egville, 3 Hagg. 206. Under various statutes a paper having all the formalities of a deed, but concluding that the deed shall not go into effect "until after the death of said B." (the grantor) or otherwise having reference to the contingency of death to make it

Under the statutes, however, which insist explicitly upon a formal method of execution, — as by acknowledging in the presence of three or more witnesses, such as are rarely found attesting instruments of other kinds,¹ — much of this refine-

operative, is held testamentary. *Bright v. Adams*, 51 Ga. 239; *Frew v. Clarke*, 80 Penn. St. 171; *Daniel v. Hill*, 52 Ala. 430. Orders upon savings-banks are held testamentary. *Marsden, Re*, 1 Sw. & Tr. 552. An instrument in the form of a letter may be a valid will. *Cowley v. Knapp*, 42 N. J. L. 297. And see as to various brief and informal instruments manifesting the testamentary intent, 1 Redf. Wills, 4th ed., 165-181, and cases cited; *Clarke v. Ransom*, 50 Cal. 595. In short, the form of a will is unimportant; but any paper of a testamentary character, which is executed after the statute formalities, is entitled to probate. *McBride v. McBride*, 26 Gratt. 476.

As to a will executed in contemplation of a particular casualty which did not happen, and conditional wills generally, see 1 Redf. Wills, 176, 177, and cases cited; *French v. French*, 14 W. Va. 458. The point of inquiry is whether the contingency was the occasion of execution simply, or the condition on which the will was to become operative.

Notwithstanding the English cases decided before the statute of 1 Vict. c. 26, which paid so much regard to intentional dispositions informally executed, we may regard it as the settled doctrine of American States that a will must be perfect in the testamentary sense at the decease of the testator, or it cannot take effect as a will; and this because American statutes have long prescribed certain formalities of execution as indispensable, including a due attestation by witnesses. Mere drafts or minutes of a will are therefore inadmissible to probate. See 1 Redf. Wills, 225; *Vernam v. Spencer*, 3 Bradf. Sur. 16; *Ruoff's Appeal*, 26 Penn. St. 219; *Aurand v. Wilt*, 9 Penn. St. 54; *Lungren v. Swartzwelder*, 44 Md. 482; *Hart v. Rust*, 46 Tex. 556. But some of our earlier decisions, made

under statutes less explicit, appear to conform to the contemporaneous English rule. See *Booster v. Rogers*, 9 Gill, 44. The paper may be testamentary in design as to part of the property and so admissible to probate, but incomplete in design as to another part and so far inoperative. *Devecmon v. Devecmon*, 43 Md. 335.

¹ There are great variations (as one may gather from general works on Wills) concerning the number of witnesses required for the due attestation of a will. In England, prior to 1838, a devise of real estate had to conform to the statute of frauds in certain respects which did not apply to wills of personal property; the latter being, of necessity, reduced to writing, generally speaking, but under the statute requiring no further formality; so that the same will, if professing to dispose of both real and personal estate, might operate in the latter respect, but not in the former. But the new statute, 1 Vict. c. 26, which took effect in 1838 (permitting wills previously executed to remain valid), abolished this mischievous distinction for the future, and superseded the old provisions of law by new ones which exacted the same formalities of execution, whatever the description of property; declaring that no will, except those of soldiers and mariners, should be valid unless in writing, executed at the foot by the testator, and acknowledged in the presence of two or more witnesses. 1 Wms. Exrs. 66, 67. Hence English citations should be distinguished under these two systems by the American practitioner of this day who has been accustomed to solemn forms of execution under his local law.

But no particular form of attestation by the witnesses is in general required by English or American statutes. Thus,

ment upon the *animus testandi* is dispensed with, and the law of wills becomes restored to its legitimate footing. Orders, bills of exchange, and papers hastily drawn up may even thus demand judicial recognition as wills;¹ but the solemnity of an execution with attestation affords a reasonable assurance that the deceased intended thereby a testamentary act with its attendant consequences to his estate after death. The witnesses become sponsors to the probate court when the maker's own lips are silent.

There is all the more reason for hedging testaments about with peculiar formalities, inasmuch as our courts permit a testamentary disposition of one's estate to be partial as well as total, and in some instances appear even to have considered that the same instrument might operate partly *in præsenti* and partly after death;² so that, except for the safeguards of statute execution, probate would little aid the sound public policy of a general and equal distribution. Nothing causes such private heartburnings or so wrecks the peace of families as the ill-considered will of an ancestor, and a bestowal of preferences out of his estate to particular kinsmen or strangers, which they may be suspected of having procured unfairly.

§ 64. By whom the Will should be propounded for Probate. — The duty of propounding the will for probate devolves naturally upon the person or persons designated to execute its

where a will solemnly executed and attested is found with some appended paragraph or paper pinned to the back, signed by the testator and attested, however informally, by two other persons, this addition may serve all the purpose of a codicil, and require probate. *Brad-dock, Goods of*, 24 W. R. 1017.

¹ A paper executed, with all due formalities, such as a bill of exchange, is entitled to probate. *Jones v. Nicholay*, 2 Rob. 288. So may a deed addressed to one's administrators and executors. *Frew v. Clarke*, 80 Penn. St. 171. And see, as to a simple order contained in a single sentence, *Cock v. Cooke*, L. R. 1 P. & D. 241; *Coles, Goods of*, L. R.

2 P. & D. 362. Doubtless an instrument formally executed as a will, would, if shown to be done in jest, have no legal operation. *Nicholls v. Nicholls*, 2 Philim. 180; but such jests are too rarely perpetrated to occasion perplexity. Palpable error in executing may vitiate; as where two wills were prepared for execution each by A. and B., and through mistake A. executed the will prepared for B. *Hunt, Goods of*, L. R. 3 P. & M. 250.

² See *Doe v. Cross*, 8 Q. B. 714. But cf. as to whether the same instrument can operate both as a deed and a will, *Thompson v. Johnson*, 19 Ala. 59.

provisions. Nor ordinarily can the designated executor relieve himself of this duty except by filing his renunciation in due form as of probate record, and discharging himself of custody in a prudent manner. But the executor might be absent or incapacitated from service, when the emergency, so often unforeseen, of the testator's death arose, or else in culpable default. Probate, and more especially the production of the document for probate custody, is transcendent, however, to all such mischances, and the public necessity of clearing titles and placing the dead person's estate in due course of settlement for the benefit of creditors and all others interested, paramount to the right of any particular person to execute the trust. When the person entitled renounces or fails to qualify, the court has recourse to the appointment of an administrator with the will annexed; and in case of protracted contest or inevitable delay from one cause or another, may commit the estate to a temporary or special administrator for collection and presentation of the property; all of which will appear more fully hereafter.¹ But the will itself must be produced before the court or register, whoever may be its custodian; and the death having conferred a probate jurisdiction, any person interested, or who believes himself interested in the estate of the deceased, may petition for citation to have the will brought into the court. Of a custodian's excuses for delay or non-production under such circumstances the court shall judge.

§ 65. Petition and Proceedings for Probate, etc.; Probate in Common Form and Probate in Solemn Form. — Any one, therefore, who claims an interest under what purports to be the will of the deceased, or who wishes to discharge himself of its custody, may have the instrument seasonably surrendered

¹ See *c. post* as to administration.

² Godolph. pt. 1, c. 20, § 2; 3 Redf. Wills, 2d ed. 45; 1 Wms. Exrs. 318-320; *Foster v. Foster*, 7 Paige, 48. It is matter of public interest that the will should be produced. Any one expecting a legacy may thus petition, as the

old books say, "to the intent that they may thereby be certified whether the testator left them a legacy." Godolph. ib. The jurisdiction of the local probate court for thus subserving public policy is usually detailed by the local statute.

into the probate custody. And it is held that, whenever the executors decline to offer an instrument for probate, any one claiming an interest under it, and not a mere intruder, may present it in his stead.¹ Usually, however, the petition for probate embraces that for the appointment of executor or administrator with the will annexed, and is presented by the party claiming the office ; and under the simple probate practice of our American county courts, the petitioner sets forth, in a printed blank, the facts of death and last domicile of the deceased, the names and places of residence of the surviving widow or husband and next of kin, and, alleging that the paper or papers presented constitute the last will and testament of the deceased, prays his appointment, making due reference to the foundation of his claim for the office, and his willingness to qualify according to law.²

Probate law recognizes two modes of proving a will : (1) in common form ; (2) in solemn form, or, as it is said, *per testes*, or by form of law. The essential distinction consists in a careful establishment of the validity of the will by proof under the latter method, but not under the former ; though the line is not drawn with uniform exactness as respects English and American practice on this point.

§ 66. **Probate of Will in Common Form.** — (1) As to the first method, probate in common form applies only for convenience, expedition, and the saving of expense where there is apparently no question among the parties interested in the estate that the paper propounded is the genuine last will, and as such entitled to probate. For contentious business before the court, probate in common form would be quite unsuitable.

According to the English ecclesiastical practice, in which such probate originated, a will is proved in common form, as the books state, when the executor presents it before the judge, and in the absence of, and without citing, the parties interested, produces more or less proof that the testament

¹ *Ford v. Ford*, 7 Humph. 92 ; *Enloe v. Sherrill*, 6 Ired. 212 ; *Stone v. Huxford*, 8 Blackf. 452. testamentary capacity of the testator need not be alleged in the petition for probate. *Hathaway's Appeal*, 46 Mich. 326.

² *Smith Prob. Pract. (Mass.)* 45. The

exhibited is the true, whole, and last testament of the deceased; whereupon the judge passes the instrument to probate and issues letters testamentary under the official seal.¹ An important feature of this practice, from the earliest times, has been the oath of the executor who propounds the will for probate as to all the essential facts; and upon this oath so great reliance has always been laid in England, that by means of it a will purporting to be duly attested by witnesses, undisputed and apparently regular upon its face, is readily probated. And the court of probate act of 1857 (20 & 21 Vict. c. 77), treats the disposition of all such non-contentious business as so purely formal that probate or letters of administration may in common form be procured from the registrar; direct application to the court being nevertheless permitted, as parties may prefer.² •

Where there is no contention, nor reason for contention, English practice leaves the executor to his own choice as between taking probate of the will in common or in solemn form. And it is observable of English probate in common form, not only that the mode of proof is thus made to subserve the executor's convenience as far as possible, but that no notice need be given to persons interested in the will, nor opportunity afforded them to object to the proof. The registrar or court, however, is expected to hold the scales impartially, to require sufficient testimony for establishing the

¹ Swinb. pt. 16, § 14, pl. 1; Wms. Exrs. 325.

² Wms. Exrs. 7th ed., 320-332, citing sections of the above statute, together with rules and orders of court. To understand the English precedents relating to probate in common form, one must distinguish between wills made prior to 1838, when wills of personal property required no formal attestation by witnesses, and wills made since, upon which statute 1 Vict. c. 26 (*supra*, § 63), operates, requiring two witnesses. In the former instance the will, if attested by two subscribing witnesses, might be admitted to probate upon the executor's oath, if all appeared regular; or, when

not attested at all, by an affidavit of two persons (or in an extreme case, of one person only) to the testator's signature.

1 Wms. Exrs. 327-330, and cases cited; Brett v. Brett, 3 Add. 224. In the latter instance, the rule is, to admit to probate in common form any will which has a clear attestation clause upon the executor's oath alone; but if the attestation clause does not speak clearly and there remains doubt, to require one of the subscribing witnesses to testify as to regularity; this requirement being, however, dispensed with at discretion. 1 Wms. Exrs. 330-332, and cases cited; Hare, Goods of, 3 Curt. 54.

paper as *prima facie* a testamentary one, duly executed, and to admit nothing to probate but what appears entitled thereto. Where probate in common form is sought of an instrument which on the face of it is imperfect, probate will not be granted except upon affidavits stating a case sufficient to establish the will upon solemn proof, and upon the express or implied consent, moreover, of all the parties interested. Neither can the consent of all interested parties procure the grant in common form of an apparently invalid will; nor can affidavits establish a doubtful instrument aside from citing in the parties interested or procuring their formal waiver of the doubt.¹ In wills of modern date, requiring attestation by two witnesses under the statute 1 Vict. c. 26, affidavits are called for where there is no regular clause of attestation; if it thus appears that the will was executed in due compliance with the statute, the informality becomes of no legal consequence; but, if otherwise, the court rejects the prayer for probate in common form, leaving all interested parties to their own course, whether to propound the will afterwards in solemn form or to proceed as in case of intestacy.² Where executors propound a certain instrument, claiming that another paper, which the testator executed afterwards, is invalid as a will, and such claim appears correct, besides which the persons interested in the late paper, after citation to propound it for probate, decline to do so, but assent to the earlier one, probate in common form of the earlier paper would be proper.³

§ 67. **Probate of Will in Common Form; the Subject continued.** — The probate of wills in common form is permitted by the local laws of several American States, and, as in England, upon a reasonable assumption that the instrument presented is valid in all respects, and its proof not contested by

¹ 1 Wms. Exrs. 329, and cases cited; Edmonds, Goods of, 1 Hagg. 698; Tolcher, Goods of, 2 Add. 16. Where minors are parties interested, probate in common form cannot usually be obtained of a will which is apparently imperfect, since their consent is unobtainable.

Gibbs, Goods of, 1 Hagg. 376. And as to issue born after probate, see Taylor, Goods of, 1 Hagg. 642.

² Ayling, Goods of, 1 Curt. 913.

³ Palmer v. Dent, 2 Robert. 284; 1 Wms. Exrs. 332.

any of the parties interested.¹ Thus, in New Hampshire, this mode of probate finds distinct statute recognition; not, however, with a similar reliance upon the executor's oath, for, American law commonly demanding attestation by witnesses, the judge approves in common form upon the testimony of one of the subscribing witnesses alone, without requiring the other witnesses to attend; though approval is given apparently upon *ex parte* proceedings, as in England, so as to dispense with a citation to persons interested in the estate.²

§ 68. **The Subject continued; American Statutes as to Non-Contentious Business.** — What in an American State would be called probate in common form may well vary still farther from the English method, as do the statutes in comparative historical sequence, both as respects the needful formalities of wills and probate jurisdiction. Citation, for instance, being simple and inexpensive, or by a county newspaper publication rather than personal summons, and practical distinctions between wills of real and of personal property being quite out of favor, in American jurisprudence, the American procedure usually refers probate to the judge, while the register, exercising no such functions, receives simple official custody of the so-called will, and upon the petition for probate placed upon his file at any time, orders a citation to be published, that all parties interested may appear before the judge at the next convenient court day. An excellent statute in Massachusetts, to which we shall presently allude again, provides that, when it appears to the court, by the written consent of the heirs-at-law, or other satisfactory evidence, that no person interested in the estate intends to object to the probate of the will, the court may grant probate thereof upon the testimony of one only of the subscribing witnesses.³ Probate

¹ Thus it is or has been recognized in New Hampshire, North Carolina, South Carolina, Mississippi, etc. *Armstrong v. Baker*, 9 Ired. 109; *Kinard v. Riddlehoover*, 3 Rich. 258; *Jones v. Mosely*, 40 Miss. 261; *Martin v. Perkins*, 56 Miss. 204.

² *George v. George*, 47 N. H. 44; *Noyes v. Barber*, 4 N. H. 406.

The probate of a will in common form is effectual and binding until attacked and overturned in direct proceedings. *Tucker v. Whitehead*, 58 Miss. 762.

³ Mass. Gen. Sts. c. 92, § 19; *post*, § 70.

under this statute is not rendered *ex parte*, or with the inconclusiveness of a strict probate in common form, but stands to all intent as a probate in solemn form, because all the interested parties must have been brought within the scope of a judicial investigation, and their respective rights fairly protected. For, as we must bear in mind, the essential facts which entitle a paper legally to probate do not differ, whether the probate is contested or not contested. And as between the executor named in a will and a mere subscribing witness, the testimony of the latter is the safer, as a rule, to depend upon in all cases of probate.

§ 69. **Probate of Will in Solemn Form; English Practice.** — (2) As to the second method of proving wills. Probate in solemn form is the only kind suitable where the validity of the will is disputed; and to accept the English, though not, perhaps, the American, distinction, the only kind which a judge alone, and not a register, is empowered to grant, and which necessarily brings in all interested in the estate as parties to the probate proceedings, so as to be bound by the final decree.

The English probate court has established rules for contentious business of this description. Thus, an executor may be compelled to prove a will in solemn instead of common form by any one of the next of kin, or a person interested in the will, such person having first filed a caveat in the court which takes jurisdiction of the estate of the deceased, to the intent that notice shall be given him of any application for probate, and afterwards responding to a notice sent from the registrar accordingly.¹ So, too, after an executor has propounded and proved the will in common form, he may be put to the proof over again, *per testes*, in solemn form, by any person having an interest, and this (as it has been held) notwithstanding a long lapse of time, like thirty years, and the great inconvenience of procuring proper testimony, which the

¹ 3 Redf. Wills, 2d ed. 27 n.; Rules and Orders under 20 & 21 Vict. c. 77, and the register enters the cause upon and 21 & 22 Vict. c. 95. Upon the docket accordingly. party answering to his notice, the con-

executor may suffer in consequence.¹ That the next of kin acquiesced in proving the will in common form does not debar him from insisting afterwards upon the solemn probate; nor does even his receipt of a legacy under the will, provided he brings the legacy into court before pursuing his right, that its payment may abide the result of the contest.² The right of the next of kin as such to require proof of the will in solemn form is absolute; and the same right extends to any party in interest. But some interest, however remote, must be shown before the executor can be put to so troublesome a task. A creditor as such has no recognized interest in the probate, but only a right to ascertain whether there be assets sufficient to meet the debts.³ But as *amicus curiae* and without costs any creditor may contest a will; and it would appear that whenever the court or registrar finds that probate in common form ought not to be granted, probate in solemn form may be compelled, though the practice is to wait until some interested party opposes the will of his own motion.⁴

Finally, in English practice, the executor may himself propound the will in solemn form, in the exercise of a rightful discretion.⁵ And manifestly, wherever the executor is not of kin and sole legatee, but other large pecuniary interests are at stake, this must be his only prudent course; unless it is certain that the will is neither objectionable in itself nor likely to be objected to. In such case, the executor cites

¹ 2 Wms. Exrs. 334; Godolph. pt. 1, c. 20, § 4. Swinburne, pt. 6, § 14, pl. 4, seems to limit the time of compelling such solemn probate to ten years; but Williams considers this a typographical error. 1 Wms. Exrs. 334, n. One who lets a long time elapse before requiring such probate can claim no indulgence of the court, and nothing beyond his legal rights. *Blake v. Knight*, 3 Curt. 553. Where no statute fixes the barrier, it is after all uncertain whether any specific time can be set for limiting such compulsion. 2 Phillim. 231, note.

² Benbow, Goods of, 2 Sw. & Tr. 488; *Core v. Spenser*, 1 Add. 374; 1 Wms. Exrs. 336, 337. A legatee who has re-

nounced administration with the will annexed is not debarred from compelling solemn probate. 2 Cas. temp. Lee, 241.

³ 1 Cas. temp. Lee, 544; *Menzies v. Pulbrook*, 2 Curt. 845; 1 Wms. Exrs. 338.

⁴ 1 Cas. temp. Lee, 544; *Menzies v. Pulbrook*, *supra*. The vexatious conduct of a party in interest, who compels probate in solemn form, after permitting probate in common form, affords reason rather for condemning him in costs than for denying the right of compulsion. See *Bell v. Armstrong*, 1 Add. 375.

⁵ 1 Wms. Exrs. 335; 3 Redf. Wills, 3d ed. 27 n.

the next of kin and all others claiming an interest, to attend the proceedings; and at the appointed time, the will having been proved by sufficient testimony, upon a hearing, and all direct contest, should any arise, and the proceedings in the case terminating in a probate of the will in solemn form, the judgment stands conclusive like other final judgments, unless appealed from.¹

Citation to all parties in interest is a feature incident to all contentious proceedings for establishing a will. And while English probate practice had reference formerly to wills of personal and not real estate, the Court of Probate Act of 1857 requires heirs-at-law and devisees to be cited whenever the validity of a will affecting real estate is disputed on proving it in solemn form, or in any other contentious cause; and the validity of the will being once solemnly adjudged, the decree binds forever all persons thus cited or made parties.²

§ 70. Probate of Will in Solemn Form; American Practice.—Our American practice being simple and inexpensive by comparison, less occasion is found than in England for duplicating probates; and in most States one probate practically concludes all issues. This probate deserves the style of solemn form (though seldom designated as such), and borrows certain features, including the citation, from the English spiritual practice. One rule applying in general, whether the will relate to real or personal estate, or to both,³ the citation

¹ *Ib.* Even though certain next of kin were not regularly cited; yet their actual cognizance that probate in solemn form was pending through the citation of others binds them to oppose or be forever barred. *Ratcliffe v. Barnes*, 2 Sw. & Tr. 486.

² Act 20 & 21 Vict. c. 77, §§ 61, 63; *Wms. Exrs.* 341; *Fyson v. Westrope*, 1 Sw. & Tr. 279.

³ Such, for instance, is the practice in Massachusetts, which is similar to that of many other States. *Smith Prob. Pract.* 46; *O'Dell v. Rogers*, 44 Wis. 136; *Parker v. Parker*, 11 Cush. 519.

In some parts of the United States personal service or summons is insisted upon, and newspaper publication alone will not give jurisdiction of the parties interested sufficient to conclude them. Thus notice must be mailed to each heir or personally served. *Bartel's Estate*, *Myrick* (Cal.) 130; *Cobb, Estate of*, 49 Cal. 600. In a suit to contest the validity of a will, the legatees and devisees are made indispensable parties in Ohio. *Reformed Presb. Church v. Nelson*, 35 Ohio St. 638. Local statutes should be consulted on such points of practice.

which issues from the register's office, upon the filing of the will accompanied by one's petition for letters testamentary or of administration, embraces in terms heirs-at-law, next of kin, and all other persons interested in the estate of deceased. These are summoned to appear in court at a day named, and show cause, if any they have, why the will should not be allowed and the petition granted. This citation requires usually no personal service, but simple publication by copy in some designated newspaper which circulates in the county of the testator's last domicile. Once a week, for three successive weeks, is the rule of publication in many States; though the form and terms of notice are largely in the discretion of the judge. Formal notice is dispensed with when the heirs-at-law, next of kin, and all others interested in the estate of the deceased express in writing their waiver of notice in favor of the petition, being all *sui juris*; otherwise, the petitioner, having served the citation in accordance with the terms prescribed, makes his return of the fact under oath, on or before the day fixed for the hearing.

The procedure being thus essentially in solemn form, inasmuch as heirs, kindred and all other parties interested are sufficiently summoned and made parties to the hearing for probate, to contest then and there the will propounded, if they so desire, examine all the witnesses to the will and introduce counter testimony, the judicial hearing, whether upon contest or not, concludes the validity of the will; subject, of course, to vacating probate on appeal, the submission of issues of fact to a jury, impeachment by direct proceeding, and other rights, such as local statutes and practice may secure. The decision of the county judge of probate is that of the lower tribunal of competent original jurisdiction, and concludes, while undisturbed, the common-law courts.¹ And the only distinction worthy here of regard is, that while at the

¹ *Brown v. Anderson*, 13 Geo. 171; *an opportunity to be heard on the subject.* Richardson, C. J., in *Noyes v. Wms. Exrs.* 333, Perkins's *n.* "We understand a probate in solemn form to be a probate made by a judge, after all persons whose interests may be affected by the will have been notified and had Barber, 4 N. H. 409. And see *Townsend v. Townsend*, 60 Mo. 246; *Parker v. Parker*, 11 Cush. 524; *Marcy v. Marcy*, 6 Met. 367.

probate hearing the propounder of a will, who anticipates a contest, must be prepared to prove his case (subject to any adjournment of the case for good reasons), probate, where no contention arises, may be granted on the favorable testimony of a single subscribing witness, as the statutes of some States expressly provide.

There are States, however, in which the probate in solemn form is distinguished, as in England, from that in common form, and where the due citation of all persons in interest to witness the proceedings and the production of the will in open court, for proof upon testimony which they may fully controvert, becomes appropriate to contentious cases, or else calls for an executor's discretion.² In such States, the law sometimes limits the period within which a probate in common form may rightfully be contested.³

§ 71. **Contest over Conflicting Testamentary Papers.** — Contest may arise over the probate of conflicting testamentary papers, each of which has been propounded as the instrument truly entitled to probate. Here the object being to ascertain which, if either or any of them, embodies in testamentary form the last wishes of the deceased, proof of the instrument

¹ Mass. Gen. Stats. c. 92, § 19; Dean v. Dean, 27 Vt. 746; Rogers v. Winton, 2 Humph. 178 (as concerns a will of personal property). Such a statute, in aid of a probate procedure so inexpensive as ours, secures the main advantages of a probate in common form while avoiding its obvious disadvantages. It is very desirable that this enactment should be general in the United States. In some States the propounder of a will is bound to have all the subscribing witnesses ready to testify (three or more in number, as some States require, for a due attestation), even though the attestation clause should appear perfect and the will regular upon its face, and no one objects to the probate. See Allison v. Allison, 46 Ill. 61; 3 Redf. Wills, 37, n. This appears a useless formality

and expense to an estate. But even though all parties interested waive objection, as they might do by collusion, the court should not, we apprehend, admit a will to probate without calling for another witness or better testimony, if the single subscribing witness fails to make satisfactory proof, and the validity of the will is not made out as a *prima facie* case.

² Brown v. Anderson, 13 Ga. 171; *supra*, § 67.

³ 1 Wms. Exrs. 335, Perkins's n.; Parker v. Brown, 6 Gratt. 554; Roy v. Segrist, 19 Ala. 810; Martin v. Perkins, 56 Miss. 204. Probate in the common form cannot be pleaded as *res judicata* in a direct proceeding to determine the validity of a will. Martin v. Perkins, 56 Miss. 204.

of latest date comes first in order.¹ A similar rule applies where the validity of particular codicils is in dispute.

§ 72. **Agreement of Parties in Interest to conform to an Invalid Will.**— Out of respect to the wishes of a deceased person, all parties in interest in his estate may agree to carry out provisions of a certain will or codicil, which, for want of due execution or other cause, must be pronounced invalid. To such agreements, all who may be lawfully entitled to share in the estate and its benefits (creditors not included) should be made voluntary parties. Such transactions, in fact, stand upon the footing of general dispositions by the rightful owners of property, and cannot operate to entitle to probate what was not, in the legal sense, a will. But where a pending contest has been adjusted out of court, by all the parties interested, and opposition is withdrawn to the particular will propounded, such will may be passed to probate on *prima facie* evidence of its validity, leaving private arrangements concerning the distribution of the estate for the parties to prove and enforce in other courts, or carry out amicably among themselves.²

§ 73. **The Proof needful to establish a Will; Proceedings at the Hearing for Probate.**— The party who propounds a will for probate should be prepared to prove affirmatively three things, as conformity with the statutes, English or American, at the present day usually demands: (1) that the will was in writing duly signed by the testator, or under his express direction; (2) that the will was attested and subscribed in presence of the testator by the requisite number of competent witnesses; (3) that the testator at the time when such execution took place was of sound and disposing

¹ Lister v. Smith, 3 Sw. & Tr. 53.

² See Greeley's Will, *In re*, 15 Abb. Pr. N. S. 393. Courts of probate have no power or discretion to superadd other conditions or dispense with any of those enumerated in the statute as necessary to admit a will to probate. Doran v. Mullen, 78 Ill. 342. A New York sur-

rogate has power to allow the proponent of a will, whose admission was contested, to withdraw the same from probate; but *semble* not the testimony and proceedings on an application for probate. Heermans v. Hill, 4 Thomp. & C. 602; Greeley's Will, *In re*, 15 Abb. Pr. N. S. 393.

mind. In other words, the essentials of a statute execution must be shown as a fact; and further, that the testator was at the time of such execution in suitable testamentary condition; which latter essential involves several elements, as we shall presently show, not easily to be compressed into a single verbal expression.

In the foregoing respects, and in general, to show that the instrument propounded was the testator's last will and testament, the burden of proof rests upon the party who offers the instrument for probate; and what is here said of a will applies also to each codicil which may be offered with it.¹ And inasmuch as the burden of proof rests thus upon the proponent, as to due execution of the alleged testator's competency, he is entitled to open and close the case where a jury is empaneled.²

But the usual rules of evidence apply to such judicial hearings. The proponent is aided by legal presumptions, and the burden of proof may shift from one side to the other in the course of a hearing. By the old rule of the English ecclesiastical courts, one witness could not make full proof of a will in solemn form;³ and yet, as we have seen, various American statutes now permit a single satisfactory witness to prove a will which no party in interest objects to,⁴ while sound modern practice here, as in England, insists that the rules of evidence applicable in common-law tribunals shall be observed in the trial of all questions of fact before the court of probate.⁵ The party who has the burden of establishing a will gives evidence by his subscribing witnesses of such facts as make out *prima facie* a valid testamentary instru-

¹ 2 Wms. Exrs. 20, 342; Sutton v. Sadler, 3 C. B. N. S. 87; Robinson v. Adams, 62 Me. 369; Crowninshield v. Crowninshield, 2 Gray, 524; Taff v. Hosmer, 14 Mich. 309; Delafield v. Parish, 25 N. Y. 9; Comstock v. Hadlyme, 8 Conn. 254; Evans v. Arnold, 52 Ga. 169; Gerrish v. Nason, 22 Me. 438.

² Robinson v. Adams, 62 Me. 369; Taff v. Hosmer, 14 Mich. 309.

³ 1 Wms. Exrs. 342; N. Y. Rep. 12; Evans v. Evans, 1 Robert. 165.

⁴ *Supra*, § 70. But see requirement of a New York statute that all the witnesses shall be examined, if residents, etc. Swenarton v. Hancock, 22 Hun, 43.

⁵ See English statute 21 & 22 Vict. c. 77, § 33 (court of probate, act of 1857), to this effect, cited 1 Wms. Exrs. 344; Wright v. Tatham, 5 Cl. & Fin. 670. And see Hastings v. Rider, 99 Masa. 625, *per* Gray, J.

ment; showing, as he ought, that the execution was formal and regular, with respect to both signature of the testator and the attestation; and that the testator appeared to be of sound and disposing mind and capacity. The proponent seldom has to go beyond formal proof by the subscribing witnesses (who, from their peculiar connection with the testator and his instrument, should be deemed of the first consequence in the proof), and possibly one or more of these may be dispensed with. Whether more proof be requisite on his part must depend upon circumstances, and particularly (the instrument itself appearing regular on its face) upon the mode and force of the opposition developed at the hearing. It is for the contestant, after cross-examining the proponent's witnesses, to enter upon proof of alleged incompetency in the testator, or other ground for breaking down the will, before the proponent need put in his whole case, and present affirmatively all he has to offer on such an issue.¹ In such a sense, but not more emphatically, it may be said that when the proponent has proved the due execution of a paper not incompatible in its structure, language, or details, with sanity in the testator, and when, upon such formal testimony, notwithstanding the cross-examination of his own witnesses, it is probable that the will was executed by one at the time in competent testamentary condition, the burden of showing the contrary becomes shifted upon the contestants of the will.² And should the contestants thereupon establish incompetent testamentary condition, or other ground for refusing probate of the will, the burden shifts back to the proponent, who, as the result of the whole hearing, is bound to establish satisfactorily the essentials we have stated.

¹ See Cooley, J., in *Taff v. Hosmer*, 14 Mich. 309. "All rules of evidence," observes the court, in the lucid opinion here pronounced, "are designed to elicit truth; and it is obvious that to require the proponent to anticipate, at his peril, the case that would be shown by the defence, would, in many cases, be equivalent to a denial of justice. For, although

there would still be a right to give rebutting evidence, this, in the sense in which rebutting evidence must then be understood, would be of little value, since it must be confined to disproving facts and circumstances shown by the defence."

² See *Milton v. Hunter*, 13 Bush. 163.

§ 74. **Proof of the Will; Instrument to be in Writing, and signed by the Testator.**—The English statute, 1 Vict. c. 26. § 9, concerning the execution of wills, does not require literally a signature by the testator himself; but that the will should be in writing and signed by the testator or by some other person in his presence and by his express direction.¹ And such is the expression, likewise, of various American statutes as to any testamentary disposition, whether of real or personal estate, or both.²

Unless a statute expressly provides as to the place of signature, the testator's name need not be signed at the end of the instrument. Thus, where a whole will was in the testator's handwriting, and commenced, "I, A. B., do make," etc., the instrument was held, in conformity with analogous instances under the Statute of Frauds, to have been sufficiently signed.³ But the signature, whatever its position, must have been made with the design of authenticating the whole instrument; and the natural presumption as to a document to which one's signature has not been appended, is that full execution was not meant.⁴ One signature suffices, especially if it be in its natural place at the end, though the will were contained in several pages or sheets, provided that by the handwriting, the fastening together, the verbal connection of words, or otherwise, it satisfactorily appears that all the pages or sheets were intended by the testator to be embraced by that sufficient signature.⁵ The end of the instrument, pre-

¹ 1 Wms. Exrs. 7th ed. 66–68; Bryce, *loc. cit.*, 2 Curt. 325. Such is the operation of the English statute, 1 Vict. c. 26, that formal execution was not essential to wills of personalty made in England prior to January, 1838. This fact, already referred to, should be kept in mind by the reader.

² Mass. Gen. Stats. c. 92, § 6. See exceptions noted hereafter as to nuncupative wills, etc.

³ Grayson v. Atkinson, 2 Ves. 454; Coles v. Trecothick, 9 Ves. 249; Adams v. Field, 21 Vt. 256. See Waller v. Waller, 1 Gratt. 454. Modern statutes do not generally sanction such a signa-

ture. See 1 Vict. c. 26; Catlett v. Catlett, 55 Mo. 330.

⁴ See 1 Wms. Exrs. 69; 1 Redf. Wills, 4th ed. 197.

⁵ And this though the attestation clause, through some inadvertence, indicates that the preceding pages or sheets were severally signed. Winsor v. Pratt, 5 Moore, 484. And see Jones v. Habersham, 63 Ga. 146. *Aliter*, of course, if upon the whole proof it appears that there has been some tampering with the sheets or pages; since only that which was intended to be part of a will at the time of execution can be probated.

ceding the attestation clause (if there be one), is the natural and usual place of signature ; and the Statute of Wills in England and in some American States now make such subscription imperative.¹

The testator may sign his will by making his "mark" ; and so long as he has done so with full testamentary intent, and intelligently, it is immaterial whether he knew how to write or not.² The mark is an acceptable signature without the name itself ; and as the addition of the testator's name in such cases is usually made by some other hand, clerical errors, such as putting the maiden name of a married woman for her name by marriage, need not vitiate the instrument if properly explained.³ Signing by initials of the name, or by a fictitious or assumed name, or without expressing the name in the body of the will, has been pronounced sufficient.⁴

The testator's name may be written by some other person, if done in his presence and by his express direction, even where the testator does not make his mark. This sort of execution, however, in instruments so solemn, is so unusual and so objectionable on principle, that the fact and reason for such a proceeding as, for instance, that the testator was maimed or paralyzed, ought, in common prudence, to be made clearly known to the subscribing witnesses, and, moreover, might well be expressed in the attestation clause. But where the testator's signature was made by another person guiding his hand with his consent, and he, being evidently clear in mind and free of volition, then acknowledged it, the signing was held to be the testator's act, and sufficient.⁵

¹ 1 Wms. Exrs. 67; Stat. 1 Vict. c. 26, § 9; 1 Redf. Wills, 226; Glancy v. Glancy, 17 Ohio St. 134; Sisters of Charity v. Kelly, 67 N. Y. 409; Soward v. Soward, 1 Duv. 126.

² Bryce, *In re*, 2 Curt. 325; Baker v. Denning, 8 Ad. & El. 94; Nickerson v. Buck, 12 Cush. 332; Main v. Ryder, 84 Penn. St. 217; Jenkins, Will of, 43 Wis. 610; St. Louis Hospital v. Williams, 19 Mo. 609; 1 Redf. Wills, 205. An imperfect or indistinct subscription of the testator's name to his will may be

regarded as his mark. Hartwell v. McMaster, 4 Redf. (N. Y.) 389.

³ Clarke, Goods of, 1 Sw. & Tr. 22; Grubbs v. McDonald, 91 Penn. St. 236. To make one's mark on the paper with other than the testamentary intent is not sufficient. Enyon, Goods of, 21 W. R. 856.

⁴ 1 Redf. Wills, 4th ed. 203, 205; Savory, *Re*, 15 Jur. 1042.

⁵ Wilson v. Beddard, 12 Sim. 28; 1 Redf. Wills, 4th ed. 205; Vandruff v. Rinehart, 29 Penn. St. 232; Stevens v.

And, of course, the testator's actual consent; and not any alleged reason for signing by another, is the ultimate fact upon which the validity of these unusual executions must turn.¹

Wills are usually written out on paper or parchment, and signed in ink; but a writing and signatures in lead pencil satisfy the statute requirement,² as it has been held, provided that all appears to have been done with a complete testamentary purpose, and not by way of mere draft or preliminary minutes. The use of a seal in the execution of a will is now generally dispensed with; some have thought it efficacious in a devise of lands, however, and for the execution of a power specially required to be done under seal it is still essential.³ Authorities generally concede that sealing alone is not a good execution where the statute calls for a signature.⁴

§ 75. **Signing by the Testator; Subject continued; Publication, etc.** — Presumptions favorable to the due execution of a will may be rebutted. As a general rule, however, the subscription and execution of a will in the mode prescribed by law sufficiently proves that it speaks the language and wishes of the testator. Proof that the will of an illiterate testator was read over to him is held to be not essential, provided there was due execution.⁵ But all proof of a will must con-

Van Cleve, 4 Wash. C. C. 262; Haynes v. Haynes, 33 Ohio St. 598. "A. B. for C. D." (C. D. being the testator) may thus be shown to be a good subscription. Abraham v. Wilkins, 17 Ark. 292; Vernon v. Kirk, 30 Penn. St. 218. One of the subscribing witnesses may sign for the testator. Bailey, *Re*, 1 Curt. 914. The evidence should not leave the testator's consent in such a case very doubtful; that the other wrote at his request will not be presumed. Rollwagen v. Rollwagen, 5 Thomp. & C. 402; Greenough v. Greenough, 11 Penn. St. 489.

¹ Jenkins, Will of, 43 Wis. 610; cases *supra*.

² Myers v. Vanderbilt, 84 Penn. St.

510. And especially if the will do not concern real estate. Harris v. Pue, 39 Md. 535. As to going over a will with a lead pencil and making corrections, see Fuguet's will, 11 Phil. (Pa.) 75. But as for writing on a slate, a method most unsuitable for preserving a will in legible condition, this is held inadmissible. Reed v. Woodward, 11 Phil. 541.

³ 1 Redf. Wills, 4th ed. 201, 226; Pollock v. Glassel, 2 Gratt. 439; Hight v. Wilson, 1 Dall. 94.

⁴ 1 Redf. Wills, 4th ed. 207; Smith v. Evans, 1 Wils. 313; *contra*, 3 Lev. 1, and various old English cases cited in 1 Redf. Wills, ib.

⁵ King v. Kinsey, 74 N. C. 261.

sist with a full comprehension of its contents and an intelligent execution ; and where the testator was blind or could neither read, write, nor speak, there should, according to the safer authorities, be proof not only of the *factum* of his will, but that the mind of the testator accompanied the execution ; and that he knew and understood the contents of the instrument as expressive of his testamentary intentions.¹ If a testator can read and write, his signature, duly made, imports knowledge of the contents of the paper executed as his will ; in other and peculiar instances, the proof of testamentary knowledge and intent should be clearer, though not necessarily conclusive, nor upon the point of doubt limited to any particular fact or circumstance consistent with making out a *prima facie* case of intelligent execution.² Where witnesses to a will are required to attest and subscribe the will in the testator's presence and at his request, it is not imperative that the request should be express nor that it should proceed immediately from the testator himself. Thus, the person who prepared the will might call in persons to attest when all was ready ; and from such request complied with in the presence and hearing of the testator, who makes no objection, but tacitly approves, the latter's request in contemplation of law is to be inferred.³ But the testator's condition and surrounding circumstances must always be considered ; and if, while the testator is feeble, or hardly conscious, or of doubtful capacity or volition, another person assumes the functions of spokesman and director before the witnesses at the execution, an adoption, at least, of that person's acts on the testator's behalf must appear.⁴

The testator need not declare in words to the subscribing witnesses that the instrument which they are called to witness is his will, though it would be wise for him to do so ;

¹ Sweet *v.* Boardman, 1 Mass. 262; Rollwagen *v.* Rollwagen, 63 N. Y. 504; 1 Redf. Wills, 4th ed. 220; Ray *v.* Hill, 3 Strobb. 297.

² Frear *v.* Williams, 7 Baxt. 550; Meurer's Will, 44 Wis. 392; Harris *v.* Harris, 53 Ga. 678.

³ Coffin *v.* Coffin, 23 N. Y. 9; Mairs *v.* Freeman, 3 Redf. 181; Cheatham *v.* Hatcher, 30 Gratt. 56; Bundy *v.* McKnight, 48 Ind. 502.

⁴ Heath *v.* Cole, 15 Hun, 100.

but by acts and words he may make it sufficiently clear to his witnesses that he so accepts and regards the instrument.¹ No particular form is requisite for acknowledgment, nor is it important in what order the several acts of execution occur. Not only is it held that no formal publication of the will by the testator, — that is to say, no formal act in presence of the witnesses, from which it may be concluded that he intended the instrument to operate as his will, — is necessary, but there are decisions which seem to justify a testator in concealing from his subscribing witnesses the fact that the instrument executed was a will.² That the testator need not, and usually does not, make known the contents of his will, at the time of execution, is certain.

Statutes differ, however, in respect of such requirements, and in some States the subscription must be *animo testandi*, and a paper is not entitled to probate which neither the testator, nor some one duly authorized on his behalf, has given

¹ In *Etchison v. Etchison*, 53 Md. 348, the testator did not speak while the witnesses were in the room. And see 1 Redf. Wills, 4th ed. 227; *Miller v. McNeill*, 35 Penn. St. 217; *Rosser v. Franklin*, 6 Gratt. 1; *Thompson v. Seastedt*, 6 Thomp. & C. 78; *Allen's Will, Re*, 25 Minn. 39; *Vaughan v. Burford*, 3 Bradf. Sur. 78; 1 Wms. Exrs. 89, and *Perkins's n.*; *Canada's Appeal*, 47 Conn. 450; *Norton v. Norton*, 2 Redf. (N. Y.) 6; *Young v. Barner*, 27 Gratt. 96.

² Some of our American statutes may explicitly sanction an execution without any publication. In 1 Redf. Wills, 4th ed. 219, 220, such a practice is regarded with disfavor. In *Trimmer v. Jackson*, 4 Burn. Eccl. Law, 9th ed. 102, the testator led his witnesses to believe that the instrument they executed was a deed, not a will; but the execution was adjudged sufficient. And see *Osborne v. Cook*, 11 Cush. 532; *Hulse's Will, Re*, 52 Iowa, 662; 1 Wms. Exrs. 89; *British Museum v. White*, 3 M. & P. 689. It should be observed that Stat.

1 Vict. c. 26, § 13, declares expressly that every will executed in the manner prescribed shall be valid without any other publication thereof. Swinburne gives a good reason why the testator might fail to disclose his true purpose, "because the testator is afraid to offend such persons as do gape for greater bequests than either they have deserved or the testator is willing to bestow upon them; lest they, peradventure, understanding thereof, would not suffer him to live in quiet; or else he should overmuch encourage others, to whom he meant to be more beneficial than they expected; and so give them occasion to be more negligent husbands or stewards about their own affairs than otherwise they would have been if they had not expected such a benefit at the testator's hands (or for some other considerations)." Swinb. pt. 1, § 11. All this points, however, rather at disclosing the content's of one's will, than at his recognition of the instrument as testamentary.

the witnesses to understand was his will;¹ which, on the whole, appears to be the more commendable doctrine. The formal signature need not be actually made in the presence of the witnesses, provided the testator gives them plainly to understand that the will and signature are his own.² It is recently held, under the English Wills Act, that to constitute a sufficient acknowledgment, the witnesses must at the time see, or have the opportunity of seeing, the testator's signature; and that unless this is the case, it is not sufficient that the signature is in fact there at the time of attestation, nor that the testator says the paper to be attested is his will, nor that his signature is inside the paper.³

§ 76. **Proof of the Will; Subscribing Witnesses.**—Formerly, in England, as we have seen, no witnesses to the execution or publication of a will of personal property were considered essential, still less any subscribing witness; formal publication was merely for convenience. Wills of lands were, on the other hand, under the Statute of Frauds, to be attested and subscribed more formally, or, as it was said, “by three or four credible witnesses.” Acts of Parliament attempted another distinction with reference to stock in the public funds. But, under the act of 1 Vict. c. 26, § 9, no will executed on and after January 1, 1838, can be valid, unless the testator's signature is made or acknowledged in the presence of two or more witnesses; and this requirement applies to every description of property, real and personal.⁴ For every testamentary disposition of property, two subscribing witnesses are requisite at this day in most parts of the United States; in Massachusetts and several other States there must be three; while a few States unwisely discriminate still, as between wills of real and of personal estate.⁵ The old Span-

¹ *Swett v. Boardman*, 1 Mass. 258; *Mon. 102*; 1 Wms. Exrs. 88, and cases cited. *Roberts v. Welch*, 46 Vt. 164; *Swift v. Wiley*, 1 B. Mon. 117; *Taney's Estate*, Myrick (Cal.) 210.

² *Gunstan, Re*, 7 P. D. 102; Wills Act, 1837 (1 Vict. c. 26).

³ 1 Redf. Wills, 220; *Adams v. Field*, 21 Vt. 256; *Loy v. Kennedy*, 1 W. & S. 396; *Upchurch v. Upchurch*, 16 B.

⁴ 1 Wms. Exrs. 7th ed. 66, 86.

⁵ The New England States insist upon three witnesses, as also do Maryland,

ish law which favored holograph wills (or such as a testator writes out in his own hand), impresses the codes of various south-western States, so, in some instances, as altogether to dispense with subscribing witnesses for such a will.¹ As to witnesses and attestation, other peculiar provisions, which need not here be specified, are embodied in the legislation of individual States by way of exception to the American rule.²

"Credible witnesses" were required under the Statute of Frauds, and "competent witnesses" (to quote the language of some American codes) must still be employed.³ Under either form of expression, persons beneficially interested under the will cannot serve; and those called in by a testator to witness an instrument whose contents he keeps to himself may generally assume that he has willed them nothing. A will of freehold estate attested by persons found to be beneficially interested therein was pronounced invalid long ago; and this not only as to the part which created their interest, but as a whole; and after much controversy, the English courts appear to have settled down to the theory that credibility was so fundamental to a proper execution, that the release of his interest by such a party at the time of judicial inquiry could not restore his competency, nor the sufficiency of the will.⁴ Hence, inasmuch as great injustice might thus be done by a witness unconsciously, an act whose provision by extension to wills of both real and personal estate, under 1 Vict. c. 26, § 15,⁵ annuls the interest of each attesting

South Carolina, Alabama, and Mississippi. In New York two witnesses suffice, and the same may be said of the Middle and Western States quite generally. Except, perhaps, for mean and sparsely-settled neighborhoods, the New England rule appears the better one, for a testamentary instrument becomes thus readily distinguished from other formal writings, and there is less inducement to fraud.

¹ See statutes of Louisiana, North Carolina, Mississippi, Arkansas, Tennessee, etc., as to holograph wills; 1 Wms. Exrs. 67, 7th ed., note by Perkins; Fuqua, Succession of, 27 La. Ann. 271;

Douglass v. Harkrender, 59 Tenn. 114.

² See 1 Wms. Exrs. 67, note by Perkins. In Pennsylvania, for instance, it would appear that reducing the will to writing in pursuance of the testator's directions is sufficient; that these facts may be proved by two witnesses; and that formal publication and attestation by subscribing witnesses are unnecessary. 1 Wms. Exrs. ib.

³ See, e.g., 1 Wms. Exrs. 87; Mass. Gen. Stats. c. 92, § 10.

⁴ 1 Jarn. Wills, 65; Doe v. Hersey, 4 Burn. Ecc. L. 27.

⁵ The ecclesiastical courts had mean-

witness beneficially interested, and renders him fully competent to prove the validity or invalidity of the will.¹ In American States, correspondingly, the local statute must be the guide. "Competent" witnesses are expressly required for the execution of a will in Massachusetts; but it is further enacted that if the witnesses are competent at the time of attesting the execution of the will, their subsequent incompetency, from whatever cause arising, shall not prevent the probate and allowance of a will otherwise proved satisfactorily.² In other States the legislature has employed different phrases or observed silence in this respect.³ Disqualification by reason of interest, that common law doctrine upon which our later legislation so greatly infringes, has a peculiar significance in the present connection; for the public welfare still demands that one's last wishes be authenticated by persons who are wholly detached from his estate, and stand, so to speak, between the dead and the living. These witnesses are in a measure judges of the facts attending the execution of the only kind of instrument which a principal signer cannot possibly take part in establishing; they surround the testator at a critical moment to protect him from frauds which might be

time insisted that the statute requirement of "credible witnesses" was limited in expression to wills and codicils of real estate, and had no application to personalty, wills of which might be witnessed by legatees, so as to leave the legacy good. *Wms. Exrs.* 7th Eng. ed. 1053; *Brett v. Brett*, 3 Add. 210; *Foster v. Banbury*, 3 Sim. 40.

¹ For the precise language of this enactment, see *Stats.* 25 Geo. 2, c. 6, and 1 Vict. c. 26, § 15, cited *Wms. Exrs.* 7th Eng. ed. 1054. A devise or legacy to the husband or wife of the attesting witness may thus be annulled. But only a beneficial interest fails; a bequest to the witness in trust for another is not necessarily void. *Cresswell v. Cresswell*, L. R. 6 Eq. 69. And see *Loring v. Park*, 7 Gray, 42. And the annulment applies only to the instrument actually attested, and not so as to

invalidate one's interest under another will or codicil. *Tempest v. Tempest*, 2 Kay & J. 635. In Iowa the fact that the husband is a legatee does not render his wife incompetent as a subscribing witness. *Hawkins v. Hawkins*, 54 Iowa, 443.

² *Mass. Gen. Stats.* c. 92, § 6. In other New England States, legislation is to the same purport. *Frink v. Pond*, 46 N. H. 125. And recent statutes, which extend the competency of interested witnesses and original parties to testify in civil and criminal proceedings, make express exception of the attesting witnesses to a will or codicil. See *Mass. Gen. Stats.* c. 131, §§ 13, 15; *Stat.* 1870, c. 393; *McKeen v. Frost*, 46 Me. 248.

³ An interested person may be a competent witness in some States. *Estep v. Morris*, 38 Md. 417.

practised upon his infirmity or debility; and hence they should be kept totally free from every temptation to bias or importunity. If a person, called upon to subscribe as such a witness, thinks the testator incapable of making his will, he may and should refuse to attest.¹

§ 77. Proof of the Will; Mode of Attestation by Witnesses.—Like the testator himself, the witness may sign by mark, by initial, or by fictitious name, though not by seal; his hand may be guided by another if he cannot write; and the further precautions against fraud correspond in the two cases.² The English statute is so construed, however, as to demand a literal “subscription” by the witness, in the testator’s presence, and after him, either by name or mark; not permitting one to adopt a previous signature made by himself or by any other person, as a testator might do;³ which rule, some

¹ See, on this point, *Wilde, J.*, in *Hawes v. Humphrey*, 9 Pick. 356. In States which require competent witnesses, beneficial devises, legacies, and gifts to subscribing witnesses are usually declared void, as in England. See *Sullivan v. Sullivan*, 106 Mass. 474, where it is held that a bequest to wife or husband of the witness is annulled by implication. The wife, according to the better opinion, should not be witness to her husband’s will, nor the husband to his wife’s will. *Pease v. Allis*, 110 Mass. 157; *Dickinson v. Dickinson*, 61 Penn. St. 401. As to an executor, he is not generally thought incompetent, even though his right to commissions gives him a sort of pecuniary interest. *Stewart v. Harriman*, 56 N. H. 25; *Wyman v. Symmes*, 10 Allen, 153. Stat. 1 Vict. c. 26, § 17, declares expressly that an executor shall not be incompetent. *Wms. Exrs.* 345. Nevertheless, we regard an executor as a most undesirable person for subscribing witness, and in a close contest the bias of his evident interest may prove damaging to his testimony, and break down the will. On all these points and the

general question of competency, see further 2 Greenl. Ev. § 691; *Wms. Exrs.* 87, *n.* by Perkins citing numerous authorities. In some States the release of his legacy at the time of probate will make the witness competent. *Nixon v. Armstrong*, 38 Tex. 296.

In the United States, as in England, competency has reference, not to the time of probate, but to the time when the will was executed. See expression in *Mass. Gen. Stats. c. 92, § 6, supra*: *Patten v. Tallman*, 27 Me. 17. A convicted criminal is in some instances held to be disqualified from becoming a subscribing witness; as well as a young child or idiot. 1 Greenl. Ev. § 373. But one competent at the time of execution would not become disqualified because of subsequent crime or insanity.

² 1 *Wms. Exrs.* 94, 95; 1 Redf. Wills, 229, 230; *Ashmore, Goods of*, 3 Curt. 756; *Christian, Goods of*, 2 Robert. 110; *Byrd, Goods of*, 3 Curt. 117; *Thompson v. Davitte*, 59 Ga. 572.

³ 1 Redf. Wills, 230, 231; *Hindmarsh v. Charlton*, 8 H. L. Cas. 160; 1 *Wms. Exrs.* 95, 96; *Eynon, Goods of*, L. R. 3 P. & D. 92.

American States follow,¹ but not all.² The place of attestation is immaterial where the statute is silent, provided the suitable act and intent of attestation be shown; and this, notwithstanding the testator himself is required to sign at the end.³

It might be inferred from the language of the new English statute, requiring the two witnesses to be "present at the same time," that they must attest the execution of the will in the presence of each other; but the true construction appears to be that they must attest in the presence of the testator, and after he has signed or acknowledged his signature while both were actually present together, but that attestation in the presence of each other is not essential.⁴ Different legislative expressions call for a different local construction, and in several States mutual presence of the witnesses is so far dispensed with that a will attested by witnesses who separately and at different places subscribe their names at the testator's request is well executed.⁵ The conscious and continuous testamentary intent of the testator should last however through the whole period of execution.⁶

Attestation in the presence of the testator is, moreover, explicitly demanded by the English and most American acts on this subject; and hence a series of decisions, which, starting with the assumption that a testator must have ocular

¹ Chase v. Kittredge, 11 Allen, 49; per Gray, J., where the subject is carefully examined; Mitchell v. Mitchell, 16 Hun, 97.

² Pollock v. Glassell, 2 Gratt. 439; Sturdivant v. Birchett, 10 Gratt. 67. Judge Redfield considered the English rule on this point as an unreasonable refinement. 1 Redf. Wills, 4th ed. 230, n. The Pennsylvania statute does not insist upon "subscription." Miller v. McNeill, 35 Penn. St. 217.

³ Davis, Goods of, 3 Curt. 748; Roberts v. Phillips, 4 El. & Bl. 450; 1 Wms. Exrs. 96; Potts v. Felton, 70 Ind. 166. But statutes which point out where the subscribing witnesses shall put their signatures must be complied

with. Heady's Will, 15 Abb. Pr. N. S. 211.

⁴ 1 Redf. Wills, 231, n.; Moore v. King, 3 Curt. 243; Cooper v. Bockett, 3 Curt. 648; 4 Moore, P. C. 419; 2 Wms. Exrs. 90. But cf. Casement v. Fulton, 5 Moore, P. C. 130.

⁵ Dewey v. Dewey, 1 Met. 349; Hogan v. Grosvenor, 10 Met. 54; Gaylord's Appeal, 43 Conn. 82. On the other hand, under the Vermont statute, witnesses must subscribe in the presence of each other. Blanchard v. Blanchard, 32 Vt. 62. And see as to insufficiency, Patterson v. Ransom, 55 Ind. 402; Baker v. Woodbridge, 66 Barb. 261.

⁶ See Stiles, Matter of, 2 Redf. (N. Y.) 1.

evidence of the instrument which his witnesses attest, while admitting, as they should, that his corporal presence will not suffice unless he appeared conscious of their attestation, are forced into some close refinements over the wills of blind men, invalids lying in bed, and the like.¹ Some States, however, dispense with a subscription in the testator's presence, and thus avoid the legal difficulties of a so-called constructive presence.² Consistent and intelligent execution, taken as a whole, and a fair connection between witnesses and testator in the legal formalities, should appear under all circumstances.

§ 78. **Proof of the Will; Attestation Clause.**—A perfect attestation clause must aid greatly in establishing the regularity of a will, for this affords plain written evidence of a testamentary execution, and freshens the memory on points readily forgotten. The effect of the statement in an attestation clause, that the will was signed by the witnesses in the presence of the testator, and of each other and at his request (or in such other language as the statute may direct), would be to throw the burden of proving that it was not so signed, and that the execution was irregular, upon the opponents of the will, and to discredit any subscribing witness who should undertake so to testify.³ In absence of positive statute

¹ See *Lonford v. Eyre*, 1 P. Wms. 740; *Piercy, Re*, 1 Robert. 278; *Reynolds v. Reynolds*, 1 Speer, 256; 1 Wms. Exrs. 91-93, and numerous cases cited; 1 Redf. Wills, 244-248; *Etchison v. Etchison*, 53 Md. 348. The conclusion (and an unsatisfactory one, too), to which these authorities are pushed, appears to be that the testator might have seen, and not that he did see, the witnesses sign. *Trimnell, Goods of*, 11 Jur. N. S. 248; 1 Wms. Exrs. 93, n.; *Meurer's Will*, 44 Wis. 392. And so correspondingly, where a statute requires witnesses to sign in one another's presence. *Blanchard v. Blanchard*, 32 Vt. 62.

² Arkansas, New York, and New Jersey, for instance. 4 Kent, 515; 1

Wms. Exrs. 67, n. by Perkins; 1 Redf. Wills, 244-248. Doubtless, however, a careful counsellor will insist, wherever he may, that witnesses and testator shall all execute in one another's presence, and at the same time; the testator first writing out his name and acknowledging his will, and the witnesses in turn subscribing afterwards to a formal attestation clause.

³ *Tappen v. Davidson*, 27 N. J. Eq. 459. And see *Roberts v. Phillips*, 4 E. & B. 457. Want of recollection on the part of the subscribing witnesses is not enough to overcome the presumption arising from their certificate that the facts were as certified. *Meurer's Will*, 44 Wis. 392. And see *Carpenter v. Denoon*, 29 Ohio St. 379.

requirements, neither will nor attestation clause need state the place of execution;¹ but the date of the will is usually given, and the presumptive evidence thus afforded may be of some legal consequence. No particular form of attestation, however, is requisite under the English statute,² nor probably in most American States; but a sufficient number of witnesses may subscribe their names without any express attestation clause whatever; in which case circumstantial proof that the attestation was proper should be supplied at the probate hearing.³

Recitals of an attestation clause may supply the defect of positive testimony as to what transpired in connection with the signature of the testator and the subscription by his witnesses. And the failure of recollection of the subscribing witnesses as to what occurred at the time of the signing will not defeat the probate of the will, if the attestation clause and the surrounding circumstances consistently establish its due execution.⁴

§ 79. Proof of the Will; Suitable Testamentary Condition on the Part of the Testator. — Besides proof of genuine execution as the statute may have directed, on the part of both testator and his witnesses, the proponent of the will must be prepared to show affirmatively that the testator, at the time of such execution, was in suitable testamentary condition. Suitable testamentary condition appears to involve three prime elements: (1) That the testator was of sound and disposing mind and memory, capable of understanding the nature of the act he was performing, and the relation in which he stood to the objects of his bounty and to those upon whom the law would have bestowed his property had he died intestate. (2) That he executed the will as his own voluntary act, free from the fraud, coercion, or undue influence of those about him.

¹ Hall, Succession of, 28 La. Ann. 57.

² Stat. 1 Vict. c. 26, § 9, is explicit on this point.

³ 1 Wms. Exrs. 93; Bryan v. White, 2 Robert. 315; Ela v. Edwards, 16

Gray, 91. Thus, as in the case of ordinary writings, the signatures may follow the word "witness" opposite the principal signature. Osborn v. Cook, 11 Cush. 532; Fry's Will, 2 R. I. 88.

⁴ Rugg v. Rugg, 83 N. Y. 592.

(3) That he had the testamentary purpose in so executing, and understood the instrument to be his last will and testament.¹ Where the instrument presented for probate appears quite consistent with all requirements in these respects, and executed after the required forms besides, a simple question to the witness as to the testator's apparent soundness of mind may suffice; not so, however, if by cross-examination of the witness, or otherwise, the proponent's case is shaken; for although an adult may be presumed to execute a writing while in his senses and free from constraint, the testamentary act is of all acts liable to sinister influences when performed by the sick, feeble, and dying. And the burden being accordingly upon the proponent of a will to establish full testamentary condition and capacity in the testator, no mere presumption of sanity and free will can avail as an independent fact to outweigh proof to the contrary; but the issue in all such contests is, whether the will in question was the free act and will of a competent testator.² Whatever goes to impeach the validity of the instrument offered should be open to the fullest investigation at all contested hearings; and the simple circumstance that the will is partial and unreasonable in its provisions may, in cases of doubt, cause a preponderance against its admission to probate, especially if the party to be chiefly benefited under it showed an officious and unbecoming zeal in procuring its execution.³ And even

¹ *Barker v. Comins*, 110 Mass. 477.

² *McGinnis v. Kempsey*, 27 Mich. 363; *Barry v. Boyle*, 1 Thomp. & C. 422.

³ No such circumstance, by itself, would suffice. *Gleespin, Matter of*, 26 N. J. Eq. 523. The decisions upon contests because of fraud, undue influence, or mistake are very numerous. Among the latest which dwell upon evidence and the burden of proof may be mentioned the following: *McLoughlin v. McDevitt*, 63 N. Y. 213; *Rollwagen v. Rollwagen*, 63 N. Y. 504; *Meeker v. Meeker*, 75 Ill. 260; *Tobin v. Jenkins*, 29 Ark. 151; *Lyons v. Van Riper*, 26 N. J. Eq. 337; *Barnes v. Barnes*, 66

Me. 286; *De Haven's Appeal*, 75 Penn. St. 337; *Bundy v. McKnight*, 48 Ind. 502; *Willett v. Porter*, 42 Ind. 250; *Daniel v. Hall*, 52 Ala. 430; *Wetter v. Habersham*, 60 Ga. 203; *Young v. Ridenbaugh*, 67 Mo. 574; *Canada's Appeal*, 47 Conn. 450.

For the general discussion of questions pertaining to testamentary capacity,—a topic which a work like the present cannot properly enlarge upon,—general treatises upon Wills, such as the extensive works of Jarman and Redfield, should be consulted. The cases are very numerous under this head and somewhat conflicting, though the safer conclusions reached appear those of the

though courts should rule so cautiously as seemingly to favor an unjust will, made under circumstances of doubtful propriety, a jury rarely sustains such a will; and, after all, unless the particular will be established, the proponent loses his cause.

text. There may be lunatics, not from birth alone, but made such through disease or decay; persons insane, having lucid intervals; monomaniacs, or those diseased upon one or more subjects and otherwise sound. The most difficult subject discussed in connection with testamentary capacity is, perhaps, senile *dementia*, or that decay which sets in after one's full maturity. 1 Redf. Wills, 4th ed. ca. 3, 4, and *passim*; 1 Jarm. Wills, 4th Eng. ed. 131-144. Drunkenness, so far as it disorders one's faculties and perverts his judgment as to what he is doing, defeats his will; but not habitual intemperance alone, nor even the actual stimulus of liquor on the particular occasion. 1 Redf. 160-163; Peck v. Cary, 27 N. Y. 9; Key v. Holloway, 7 Baxt. 575. As to the effect of religious delusions, modern spiritualism and the like, the rule is not stated with precision, judges themselves having various prepossessions on issues of religious faith and conscience. Cf. Lyon v. Home, L. R. 6 Eq. 655; Robinson v. Adams, 62 Me. 369; Smith's Will, 52 Wis. 543; Brown v. Ward, 53 Md. 376. The bearing of the fact of suicide upon the question of testamentary capacity is considered in McElwee v. Ferguson, 43 Md. 479. Mental unsoundness, years after the execution of a will, does not alone rebut the usual presumption of sanity. Taylor v. Creswell, 45 Md. 422. As to hypochondria, see (besides Redf. & Jarman, *supra*) Brick v. Brick, 66 N. Y. 144; Benoist v. Murrin, 58 Mo. 337.

It may be observed generally that, notwithstanding one's sickness or infirmity, his testamentary disposition may be valid, if, at the time of making it, the testator had sufficient intelligence to comprehend the condition of his prop-

erty, his relations to those who were or might naturally be the objects of his bounty, and to understand the provisions of the instrument. Testamentary capacity is the normal condition of one of full age. Horn v. Pullman, 72 N. Y. 269; Grubbs v. McDonald, 91 Penn. St. 236.

As to free agency, it is recently observed that whatever destroys it and constrains a person to do what is against his will, and what he would not do if left to himself, is undue influence, whether the control be exercised by physical force, threats, importunity, or any other species of mental or physical coercion. The state of health and mental condition of the alleged testator must be considered. Undue influence is not measured by degree or extent, but by its effect; if it is sufficient to destroy free agency, it is undue even if it is slight. Haydock v. Haydock, 33 N. J. Eq. 494; 1 Redf. Wills, 4th ed. 521; 1 Jarm. Wills, 4th Eng. ed. 131-144. On the other hand, to avoid a will on the ground of undue influence, it must be made to appear that it was obtained by means of influence, amounting to moral coercion, destroying free agency; or by importunity which could not be resisted, so that the testator was constrained to do that which was against his actual will, but which he was unable to refuse or too weak to resist. Brick v. Brick, 66 N. Y. 144, 149. No exact definition of undue influence can be given, but each case rests upon its special circumstances. Undue influence in obtaining a particular legacy does not necessarily invalidate the rest of the will. Harrison's Appeal, 48 Conn. 202; Fulton v. Andrew, L. R. 7 H. L. 448. But cf. Rhodes v. Rhodes, 7 App. Cas. 192.

§ 80. **Proof of the Will; Suitable Testamentary Condition as Respects Legal Capacity.**—We may add, as a further element of suitable testamentary condition, what in a single phrase is to be styled “legal capacity.” The general rule is, that all persons are capable of disposing by will; yet there are various classes of persons excepted by the law, not only in this respect, but in other instances, involving the *jus disponendi*. Thus, aliens have been restricted by the common law, and particularly in the acquisition and transmission of real estate; though these restrictions, which, as to lands, are exclusively of State cognizance, have been removed in many modern instances, and seldom extended to dispositions of personal property.¹ Infants, again, are wisely excepted by existing statutes both in England and the chief American States, notwithstanding the earlier doctrine, borrowed from the civilians, which permitted males at fourteen and females at twelve to dispose of personal property by a last will.² Coverture, on the other hand, operated a legal disability at the common law which our modern married women’s acts are fast superseding.³ Idiots and imbeciles are, of course, incapable;⁴ but not the deaf, dumb, or blind, who make intelligent use of the senses given them.⁵ And a long, but, happily, obsolete, list of disqualified persons is stated in the earlier English books, whose disgrace, in this respect, attended their crime or low condition, less, perhaps, from any consideration of unfitness in the individual than for the sake of enabling the crown to confiscate his chattels beyond a peradventure.⁶

¹ Co. Litt. 2 b; 1 Jarm. Wills, ed. 1861, 35, 60–64; 1 Redf. Wills, 4th ed. 8–14.

² 1 Vict. c. 26, § 7; 20 & 21 Vict. c. 77; 4 Kent Com. 506, 507; 1 Redf. Wills, 15–22; 1 Jarm. Wills, Perkins’s ed. 1861, 39. A minor over a certain age may bequeath personalty under some of our local statutes. *Banks v. Sherrod*, 52 Ala. 267.

³ 1 Redf. Wills, 4th ed. 22–29; Schoul. Hus. & Wife, §§ 457–470.

⁴ See preceding section; 1 Redf. Wills, 30, 59. A person under guar-

dianship as *non compos* is presumptively incapable of making a will. *Hamilton v. Hamilton*, 10 R. I. 538.

⁵ 1 Redf. Wills, 54–58.

⁶ Swinburne, pt. 3, § 7, enumerates among those legally disqualified from making a last will and testament, slaves, villeins, captives, prisoners, traitors, felons, heretics, apostates, manifest usurers, incestuous persons, libellers, suicides, outlawed persons, excommunicated persons, etc. Forfeiture of one’s estate, even for treason, is, by the more enlightened rule of modern times, con-

§ 81. **Proof of the Will; Testimony at the Hearing.** — The law confides so greatly in those who were placed round the testator as subscribing witnesses, as to permit them, whenever the testator's sanity is at issue, to give their opinions upon that point; besides stating fully all material circumstances which attended the execution of the will in question. But, if so testifying, they may be inquired of as to the grounds of their opinion in cross-examination, and other evidence may be put into the case to support or contradict them.¹ Any other person may testify as to the appearance of the testator and as to facts from which the state of his mind at the date of execution may be inferred; but the mere opinions of all such witnesses, who are not experts, are usually pronounced inadmissible. Experts are to be found at this day who are examined on the special subject of insanity; but an attending physician of regular standing is commonly a good enough expert to give an opinion upon his patient's mental condition, and from facts thus in proof, other experts may draw conclusions.² Subscribing witnesses may be summoned into court and examined *viva voce*; and the usual rules of evidence which guide the common-law courts will apply with the reservations already stated, to their testimony, and the credit to be given it.³ When in the course of a probate investigation, other witnesses have to be summoned, to these the peculiar privileges of subscribing witnesses cannot apply.⁴

A will is not to be defeated through the failure of attesting witnesses to remember the circumstances of attestation.⁵

finer to the life of the offender. See 2 Kent Com. 385, 386; 1 Redf. 119, 120; Bailey, Goods of, 7 Jur. N. S. 712; U. S. Constitution, Art. III., § 3. And see Wms. Exrs. 435; and English stat. 33 & 34 Vict. c. 23, § 1.

¹ 2 Greenl. Ev. §§ 691, 692; 1 Redf. Wills, 140-145; Wms. Exrs. 346, and n. by Perkins; Robinson v. Adams, 62 Me. 369; Clapp v. Fullerton, 34 N. Y. 190; Duffield v. Morris, 2 Harring. 375; Logan v. McGinnis, 12 Penn. St. 27; Dennis v. Weeks, 51 Ga. 24.

² Poole v. Richardson, 3 Mass. 330;

1 Redf. Wills, 145-158, and cases cited; Baxter v. Abbott, 7 Gray, 71.

³ Wms. Exrs. 345, 346; Stats. 17 & 18 Vict. c. 47; and 21 & 22 Vict. c. 77. Testimony as to facts shortly before and after the act of execution may be material upon the point of sanity. Nash v. Hunt, 116 Mass. 237.

⁴ See Boardman v. Woodman, 47 N. H. 120. But see Wms. Exrs. 347, and Perkins's note; 1 Redf. Wills, 140-158.

⁵ Cooper v. Bockett, 4 Moore, P. C. 419; Beckett v. Howe, L. R. 2 P. & D.

Due execution raises the presumption that all was rightly done; and not only is the proponent free to aid the will by other competent proof, but (as these were not essentially his own witnesses) he may rebut the adverse testimony of subscribing witnesses, and even discredit them. As a general rule, one who offers a will must call in all the attesting witnesses, if put to the full proof, provided all are alive, within reach of the process of the court, and still competent.¹ But where the witness is abroad, or disabled from personal attendance, his deposition may be taken; if he has died or become insane since the attestation, his handwriting may be proved; and the utter impossibility of presenting one's testimony being shown to the court, the proof may go on without him.² If the legal execution of a will be clearly established *aliunde*, probate thereof may be allowed though all the subscribing witnesses were dead or all should testify adversely.³

§ 82. **Revocation or Alteration of Wills; Codicils; New Wills, etc.**—Every will being revocable during the testator's lifetime, probate should be granted of the instrument or instruments only which constitute his last will. Accordingly, in case of a contest over two or more wills, issue joins first and most naturally on that which was executed latest. Any distinct will propounded for probate, which appears to have been executed as the statute requires and preserved intact, is pre-

1; Wms. Exrs. 103, 346, and *n.* by Perkins; Dewey *v.* Dewey, 1 Met. 349; Tilden *v.* Tilden, 13 Gray, 110; Verdier *v.* Verdier, 8 Rich. 135. Testimony to the execution of the will other than that of the subscribing witnesses may be adduced. Reeve *v.* Crosby, 3 Redf. (N. Y.) 74. The recitals of the attestation clause are here of assistance. Rugg *v.* Rugg, 83 N. Y. 592.

¹ See as to effect of English statute of 1857 on this point, Wms. Exrs. 347. The right to have all the attesting witnesses produced appears to exist for the benefit of all parties in interest, whether favorable or adverse to the will. But the right has its rational limits. See

further, Cheatham *v.* Hatcher, 30 Gratt. 56.

² Hawes *v.* Humphrey, 9 Pick. 357; Patten *v.* Tallman, 27 Me. 17; Wms. Exrs. 347, and *n.* by Perkins.

³ See Bull. N. P. 264; 2 Stra. 1096; Humphrey's Estate, 1 Tuck. Sur. 142; Wms. Exrs. 347; Abbott *v.* Abbott, 41 Mich. 540; Jenkins, Will of, 43 Wis. 610. Where all the witnesses were dead at the time of probate, and no proof of their handwriting could be found, proof of the testator's handwriting was held sufficient. Duncan *v.* Beard, 2 Nott & McC. 400. The mark of a deceased attesting witness must be shown to be his. 9 C. & P. 59.

sumed to express the testator's latest wishes;¹ but this presumption may be rebutted by the production of a later will, or other evidence of a contradictory nature. Various methods of implied revocation are known to our law; such, for instance, as the subsequent marriage of a single woman, or in case of an unmarried man, his marriage and the birth of a child.² From other alteration of the testator's circumstances, revocation by parol was formerly presumed;³ but all such methods are discouraged by the later English and American statutes, whose aim is to specify clearly what shall constitute the legal revocation of an existing will, and to insist that an actual revocation shall be plainly evinced.⁴ "To prevent the admission," says Chancellor Kent, "of loose and uncertain testimony, countervailing the operation of an instrument made with the formalities prescribed, it is provided that the revocation must be by another instrument executed in the same manner, or else by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence and by his direction. This is the language of the English Statute of Frauds, and of the statute law of every part of the United States."⁵

We may add that such acts of revocation must be done with corresponding intent, and that under the English statute 1 Vict. c. 26, § 20, and the latest American legislation, these principles are extended (with literal variance, and saving, perhaps, the effect of marriage, as above-stated), so as to embrace wills of real and personal property in the fullest sense.⁶ A testator cannot, therefore, delegate the power of revoking his will for some one to exercise upon surviving him,⁷ nor change or annul its terms by any verbal directions or declarations

¹ The law presumes the revocation of a will when it is not produced, unless its loss is accounted for. *Mercer v. Mackin*, 14 Bush, 434. As to attestation of a codicil, where will and codicil were executed together, see *Fowler v. Stagner*, 55 Tex. 393.

² 1 Redf. Wills, 293-301; *Wms. Exrs.* 7th ed. 187-204. Various statute changes have occurred in this connection. *Ib.*; and see *Schoul. Hus. & Wife*, §§ 457-470.

³ *Wms. Exrs.* 187, 201; 1 Redf. Wills, 333, etc.

⁴ *Scaife v. Thomson*, 15 S. C. 337.

⁵ 4 Kent Com. 520, 521.

⁶ *Wms. Exrs.* 127, and *Perkins's n.* There are variations of expression in such statutes, which the practitioner is bound to observe in the case before him.

⁷ *Stockwell v. Ritherdon*, 1 Robert. 661; *White, Re*, 25 N. J. Eq. 501.

subsequent to its execution.¹ The object of revocation may be to substitute another will or to adopt intestacy as a condition preferable to testacy; one may revoke a will by a writing properly attested, which contains no disposition whatever.²

Where the former will is not cancelled or destroyed outright contemporaneously with or prior to the execution of another — a course of proceeding highly to be commended in most cases while the testator retains his full mental vigor — it becomes most convenient to make an addition or supplement to such former will, observing the prescribed solemnities of testamentary signing and attestation as carefully as before. These testamentary supplements are known as codicils, or “little wills”; and the term “will” in a statute being construed to include all such instruments, codicils require proof and a probate like any other testament. From a will and its several codicils, like a statute with its later amendments, the maker’s full intention is to be gathered; the latest provisions modifying, or, if need be, annulling the earlier. From a codicil distinct reference to the original instrument is desirable, though not indispensable; and the effect of a codicil which in terms ratifies, confirms, and republishes a will, is to give the original will the same force as if it had been rewritten, re-executed, and republished at the date of the codicil.³ A new, adequate, and complete will may be held to revoke all former wills without express words of revocation; but a codicil only revokes a former will, as far as it so expressly provides or is inconsistent in terms with it; nor, apparently, should any will be construed as revoking another still extant, except so far as really conflicting with it.⁴ A codicil intends keeping

¹ *Boylan v. Meeker*, 2 Dutch. 274. As to revocation by burning, tearing, cancelling, or obliterating, see 1 Redf. Wills, 304-332; Wms. Exrs. 128-158. As to cancelling by lead pencil, see *Woodfill v. Patton*, 76 Ind. 575. A will revoked by a later will is not revived by the cancellation of the later will. *Scott v. Fink*, 45 Mich. 241.

² See *Jessel, M. R.*, in *Sotheran v.*

Denning, 20 Ch. D. 99, 104. A general clause in a will revoking all former wills revokes a prior testamentary appointment. *Ib.*

³ *Miles v. Boyden*, 3 Pick. 216. See 1 Redf. Wills, 346-365; *Brown v. Clark*, 77 N. Y. 369.

⁴ 1 Redf. Wills, 362-364, and cases cited; *Fisher, In re*, 4 Wis. 254; *Brant v. Willson*, 8 Cow. 56; *Clarke v. Ran-*

the former will extant, however, while a new and complete will does not.

§ 83. **Rule of Escrow not applicable to Wills.**—The reasons that apply to other instruments on the doctrine of escrow, do not apply to wills, unless possibly in the case of what are termed joint or mutual wills.¹ A will being the act of the testator alone and requiring the assent of no other person, delivery of the instrument to any one is not necessary, but a due execution completes the testamentary act. Hence parol evidence is recently held inadmissible to show that the testator, at the time of executing a will absolute and unconditional on its face, gave directions that it should become inoperative on the happening of certain events.²

§ 84. **Lost Wills; Republication of Will; Informal Alterations, etc.**—A will, proved to have been duly executed, which cannot be found after the testator's death, is presumed to have been destroyed by him with the intention of revoking it. But this presumption may be rebutted by evidence. Thus it may be shown that the will was torn up or burned by the testator in some insane freak, or through the coercion of another,³ or that it was accidentally or fraudulently destroyed, or that, the testator recognizing it to the last, the will must have been lost or else wrongfully suppressed by some one. Those interested under such a will do not forfeit their legal rights by the non-production of the instrument in question, provided its contents and due execution be shown by satisfactory proof, and the absence of the will sufficiently explained.⁴ Where

som, 50 Cal. 595; *Holden v. Blaney*, 119 Mass. 421. The burning of a will may amount to its complete revocation, regardless of the legal effect of the will which was drawn up in its place. *Banks v. Banks*, 65 Mo. 432. It is usual and most convenient for a new will to be drawn up so as to express on its face that the testator hereby makes his last will and testament, revoking all other wills by him at any time heretofore made. And a mere codicil by way

of amendment may well express that the testator thereby ratifies and confirms his will (referred to) in all other respects.

¹ See as to joint wills in equity, 1 Redf. Wills, 3d ed. 182; 1 Jarm. Wills, 4th Eng. ed. 31.

² *Sewell v. Slinguff*, 57 Md. 537.

³ *Rich v. Gilkey*, 73 Me. 595.

⁴ *Idley v. Bowen*, 11 Wend. 227; *Clark v. Wright*, 3 Pick. 67; *Foster's Appeal*, 87 Penn. St. 67; *Mercer v. Mackin*, 14 Bush, 434; 1 Redf. Wills,

only a part of the contents of a lost will can be proved, that part has been held admissible to probate;¹ though this seems an undesirable rule to extend far. The evidence in all cases of a lost will should be strong, positive, and certain.

Republication revives the will to which it refers, and its effect is to make the whole will as of such later date. A codicil may thus republish an informally executed will, though the act must be done with all the statutory formalities.² Republication may be either the revival of an instrument already revoked so as to give it full operation, or the re-execution of a will with similar intent.³

Alterations, erasures, and obliterations found in a will should be treated according to circumstances. If they preceded the formal execution, they stand as the final expression of the testator's wishes; but if made afterwards, the instrument in its altered shape must have been duly attested, or else the alteration will fail, and probate be granted as of a valid testament, according to the originally attested expression.⁴ The effect of obliterating or cancelling should depend as a rule upon the testator's intention; but partial revocations and changes informally made as to an executed will, our later statutes wholly discourage;⁵ nor can there be a valid can-

338-350; Wms. Exrs. 153, 378, 379; Harvey, Goods of, 1 Hagg. 595; Burls v. Burls, L. R. 1 P. & D. 472; Voorhees v. Voorhees, 39 N. Y. 463; Ford v. Teagle, 62 Ind. 61; Johnson's Will, Matter of, 40 Conn. 587; Nelson v. Whitfield, 82 N. C. 46. Contents may be established by testimony of witnesses who have heard it read. Morris v. Swaney, 7 Heisk. 591.

¹ Sugden v. Lord St. Leonards, L. R. 1 P. D. 154; Steele v. Price, 5 B. Mon. 58. But if witnesses differ materially as to some of the provisions of the will, the will cannot be proved. Sheridan v. Houghton, 6 Abb. (N. Y.) N. Cas. 234.

The suspected custodian of a missing will should be cited into the Probate Court, as shown *supra*, § 54, and reasonable exertions made to find the

original document, according to circumstances, before probate can be granted upon secondary evidence of the contents.

² 1 Redf. Wills, 376-379, and cases cited; Wms. Exrs. 205 *et seq.*

³ *Ib.* No particular words are necessary to be used in a codicil in order to effect a republication of the will to which it is annexed. Corr v. Porter, 33 Gratt. 278.

⁴ Wms. Exrs. 143-153; Jackson v. Holloway, 7 John. 394; Wheeler v. Bent, 7 Pick. 61. As to the presumed explanation of an erasure see Bigelow v. Gillott, 123 Mass. 102.

⁵ While wills of personalty might be informally executed, and before the new statute of Victoria came into operation in 1838, there were various English decisions which permitted a testator to

cellation without the exercise of a free will and a sound mind.¹

§ 85. **Probate in Whole or in Part.**—It follows from the preceding summary of principles which writers on the law of wills treat at full length, that probate of a will may require a nice judicial discrimination. To identify and record as genuine the last will and testament of the deceased is the peculiar province of the probate court; and the probate of a will, not appealed from, or confirmed upon appeal, settles all questions as to the formalities of its execution and the capacity of the testator, but not the validity or invalidity of any particular bequest, nor any question of construction.² To construe a will duly probated, and define the rights of parties in interest, remains for other tribunals; they must interpret the charter by which the estate should be settled in case of controversy; while the probate court, by right purely of probate or ecclesiastical functions, establishes and confirms that charter. But in order to do this, the probate tribunal throws out the false or the superseded will, or the instrument whose execution does not accord with positive statute requirements; it determines what writing or writings shall constitute the will. Moreover, in numerous instances, the English rule has been, that a will may be in part admitted to probate and in part refused; as, for example, where some clause has been fraudulently inserted in the will without the testator's knowledge and free consent, or in other instances of illegal and improper alteration, after the will was formally signed and attested.³ Where the executor was misdescribed or imperfectly described, to

revoke his will *pro tanto* by striking out particular sentences or paragraphs without other formality. See Wms. Exrs. 143.

¹ Rich v. Gilkey, 73 Me. 595.

² Hawes v. Humphrey, 9 Pick. 350.

³ Wms. Exrs. 377, 378; Plume v. Beale, 1 P. Wms. 388; Allen v. McPherson, 1 H. L. Cas. 191; Hegarty's Appeal, 75 Penn. St. 514; Welsh, *In re*, 1 Redf. Sur. 238; Fulton v. Andrew, L. R. 7 H. L. 448. *Semble* that in the

English probate, scurrilous imputations in a will, not affecting the disposition of the estate, may be excluded from the probate. Honeywood, Goods of, L. R. 2 P. & D. 251; 1 Robert. 423; Wms. Exrs. 378. And as to a particular bequest procured by undue influence, see Fulton v. Andrew, *supra*; Harrison's Appeal, 48 Conn. 202. A word mistakenly introduced into a will may be stricken out in the probate. Morrell v. Morrell, 7 P. D. 68.

ascertain his identity may be incidental to granting the proper letters testamentary.¹ The probate tribunal may, from the best proof afforded, gather and set forth the items of a will which has been lost or accidentally destroyed, or rendered illegible, so far as the last wishes of the testator may thus be established with certainty.² But jurisdiction to separate the false from the true, and except special clauses from probate, is to be exercised with the utmost prudence; and in England the spiritual courts could not, even by consent, expunge material passages which the testator intended should make part of his will, nor substitute names, or identify legatees, or make the probate an occasion for commentary upon the testator's text;³ while in this country the usual tenor of the decisions is to require probate to be granted of a testamentary instrument, as it stood when duly signed and attested, but otherwise without ruling out one part of it or another.⁴

A partial probate assumes that the instrument executed by the testator contained a false part which was so distinct and severable from the true part, from that which was his will, that the rejection of the former does not alter the construction of the true part. But where the rejection of words or a clause necessarily alters the sense of the remainder of the will, the question is more difficult; for even though the court is convinced (to use the words of Lord Blackburn) that the words were improperly introduced, so that if the instrument was *inter vivos*, they would reform the instrument and order one in different words to be executed, they cannot make the dead man execute a new instrument.⁵ There is no difference,

¹ Shuttleworth, Goods of, 1 Curt. 911.

² Trevelyan v. Trevelyan, 1 Phillim. 149; Wms. Exrs. 380-382; Sugden v. Lord St. Leonards, L. R. 1 P. D. 154; Rhodes v. Vinson, 9 Gill, 169.

³ 7 Notes of Cas. 278; Wms. Exrs. 378, 379; Curtis v. Curtis, 3 Add. 33.

⁴ If a will may take effect in any part, it may be admitted to probate although indefinite in other parts. George v. George, 47 N. H. 27. Probate of a will which contains illegal and void bequests may be general, and without reservation of such parts. Bent's Ap-

peal, 35 Conn. 523; s. c. 38 Conn. 26; Hegarty's Appeal, 75 Penn. St. 503. But cf. Welsh, *In re*, 1 Redf. (N. Y.) 238. And as to probate of a lost will, of which some parts cannot be proved, see Steele v. Price, 5 B. Mon. 58. Probate of a lost will should be granted as it existed in its integral state if this can be ascertained. Scruby v. Fordham, 1 Add. 74.

⁵ See Rhodes v. Rhodes, (1882) 7 App. Cas. 192, 198. *Quære* where there is in such a case a valid will within the meaning of the statute. *Ib.*

at all events, between the words which a testator himself uses in drawing up his will and the words which are *bonâ fide* used by one whom he trusts to draw it up for him; and the will in either case must be probated and construed as it reads.¹ And while words or a clause introduced into a will fraudulently, or simply without the testator's knowledge or authority, may be stricken out, the probate admitting of such a severance without doing violence to the rest of the will, partial changes cannot be made in the probate where the testator knew and virtually adopted the words or clause.²

§ 86. **Probate in Fac-Simile, or by Translation.** — According to English practice under the statute, 1 Vict. c. 26, if a will presented for probate contains upon its face an unattested alteration or obliteration, the change must be accounted for; and if, upon full proof, the will appears to have been executed before the alteration was made, probate may be engrossed as if the change had not occurred, unless it appears likely that the construction of the will might be affected by the appearance of the paper, in which case a probate in *fac-simile* is decreed.³

Where a will is written in a foreign language, probate may be granted with an accompanying translation.⁴

§ 87. **Probate of Two or More Testamentary Papers; Grant to Executors.** — Probate is not necessarily confined to a single instrument; but several papers may be found to constitute altogether the last will of the deceased, and be entitled to probate accordingly;⁵ and letters testamentary may be granted to all the executors named in the several papers.⁶

¹ Rhodes v. Rhodes, 7 App. Cas. 192.

² See Harter v. Harter, L. R. 3 P. & M. 11, 22.

³ Gann v. Gregory, 3 De G. M. & G. 777; Wms. Exrs. 331, 332.

⁴ Wms. Exrs. 386. In such case it seems proper that original and translation should pass to probate together; the original serving as the test, should questions of interpretation arise in other

courts. See L'Fit v. L'Batt, 1 P. Wms. 526.

⁵ Wms. Exrs. 107, and note by Perkins; Harley v. Bagshaw, 2 Phillim. 48; Tonnele v. Hall, 4 Comst. 140; Phelps v. Robbins, 40 Conn. 250.

⁶ Morgan, Goods of, L. R. 1 P. & D. 323. Cf., however, as to the probate where different executors were appointed for different countries, Astor, Goods of, 1 P. D. 150.

Probate granted once at the domicile inures to the benefit of all who may be appointed within the domestic jurisdiction to execute the will and administer the estate.¹ And though different executors be designated by the will to serve, with distinct powers, or for different periods of time, but one proving of the will is requisite.²

§ 88. **Decree of Probate entered; Public Custody of the Will.**

The general form of decree recites the admission of the will to probate, with perhaps the citation of kindred and procedure under the proponent's petition; it embraces usually the appointment, besides, of the executor or an administrator with the will annexed. The will having been proved, the original is deposited in the archives of the registry, and a copy entered upon the records; an attested copy being also delivered to the duly qualified executor or administrator with his letters, as constituting the full credentials of his official authority.³ Where the original probate was lost, the spiritual court granted no second probate, but furnished an exemplification from the records;⁴ and in American practice, at this day, certificates under seal are regularly furnished by the registrar of probate as the convenience of individuals may require.⁵

§ 89. **Nuncupative Wills.** — It remains to speak of nuncupative wills, or those which consist in a verbal disposition by the testator in presence of witnesses. In early times such wills were as to personal estate quite efficacious; but under the Statute of Frauds and the Wills Acts of later date, the privilege has become restricted almost exclusively to soldiers in actual military service and mariners at sea. The unwritten wills of soldiers and sailors, however, have long been distinguished from wills technically nuncupative; which last, so

¹ *Watkins v. Brent*, 7 Sim. 512; Wms. Exrs. 382.

² Wms. Exrs. 382; 1 Freem. 313; Bac. Abr. Exrs. C. 4.

³ See Wms. Exrs. 385, 386, as to the English practice.

⁴ Wms. Exrs. 386; 1 Stra. 412.

⁵ As to transcript of the record of probate of a will devising land and its effect in ejectment, see *Allaire v. Allaire*, 37 N. J. L. 312. Death of a person presumptively established by production of the probate, etc. *Carroll v. Carroll*, 6 Thomp. and C. 294.

far as the legislation of any State may still permit of their operation, cannot be held good, under the Statute of Frauds, except for a specified small amount, nor unless made, moreover, in presence of a sufficient number of oral witnesses, and usually at home, and moreover, being soon after put in writing.¹ But the Statute of Frauds expressly excepted the wills of soldiers in actual service and mariners at sea from these formalities; and hence to such wills the common law applies as it stood before this enactment, allowing great indulgence where men exposed to sudden death so far from home chose to make final disposition of their personal property, whether the last wishes were expressed by some writing informally executed or by word of mouth.² All nuncupative wills are established in probate by convenient proof of the testator's expressed wishes under appropriate circumstances, and while in testamentary condition.³

¹ Stat. 29 Car. II. c. 3, §§ 19-23; 2 Bl. Com. 501. 1 Vict. c. 26, § 11, cuts off the general right of disposing, even under restraints, by a nuncupative will.

² As to nuncupative wills, see at length 1 Redf. Wills, 184-201, and cases cited; Wms. Exrs. 116-123, 394; Broach v. Sing, 57 Miss. 115; Donaldson, Goods of, 2 Curt. 386; Thorne, Goods of, 29 Jur. 569; Van Deuzer v. Gordon, 39 Vt. 111; Gould v. Safford, 49 Vt. 498; Morgan v. Stevens, 78 Ill. 287; Leathers v. Greenacre, 53 Me. 561; King v. Vairin, 28 La. Ann. 452; Hubbard v. Hubbard, 4 Seld. 196. The provisions of the English Statute of Frauds have been generally re-enacted in American States; and so, too, later acts are found,

as in New York and Massachusetts, similar to 1 Vict. c. 26. But in some States nuncupative wills appear still to be allowed, subject of course to statute restrictions borrowed from Stat. 29, Car. II.

The ground in general, of admitting nuncupative wills to stand, appears to be that the deceased had not time nor fair opportunity to reduce his will to writing before he died. See Harrington v. Stees, 82 Ill. 50; Bolles v. Harris, 34 Ohio St. 38.

³ 1 Redf. Wills, 184-201; Wms. Exrs. 116-123. And so as to "oral wills," Mulligan v. Leonard, 46 Iowa, 692.

CHAPTER III.

APPOINTMENT OF ORIGINAL AND GENERAL ADMINISTRATORS.

§ 90. *Original and General Administration granted wherever there is no Executor, etc.; Origin of this Jurisdiction.*—The grant of original and general administration by a probate court corresponds to that of letters testamentary issued to an executor; its application being, however, in cases where a deceased person, whose estate should be settled, either died wholly intestate or left a will of which, for some reason, no one can be a qualified executor within the jurisdiction. According to the various cases which may arise, there are various special kinds of administration, besides what may be termed “general administration.”

Anciently, as we have seen, it was regarded in England as a prerogative of the crown to seize upon the goods of one who had died intestate, and dispose of them for the benefit of his creditors and family; but the prelates, being afterwards intrusted with these functions, appropriated a large part of such estates upon the pretence of pious uses, until Parliament interposed and required them thenceforth to depute administration to “the next and most lawful friends of the dead person intestate,” who should be held accountable to the ordinaries, and in common-law courts in the same manner as executors.¹ Hence originated the office of administrator in the modern sense of our law; and estates testate and intestate becoming thus assimilated, ecclesiastical courts were taught to confine their jurisdiction to issuing the credentials of title and authority in either case under fixed and uniform rules, and to supervise without meddling in the active management of the affairs of the dead. Finally, in England, as in the several United States, the whole authority as to probate, and the settlement of the estates of deceased persons,

¹ *Supra*, § 7; Wms. Exrs. 401–404; 31 Edw. 3. c. 11, § 1; 2 Bl. Com. 495.

departed from ecclesiastical control and became vested in responsible civil tribunals, known most commonly as courts of probate, and exercising what is usually styled "probate jurisdiction."¹

§ 91. **Intestacy Fundamental to the Grant of General Administration; Death and Domicile or Local Assets.** — To the grant of general and original administration upon the estate of a deceased person, intestacy is a pre-requisite; such allegation should be made in the petition, and the court should have reason to believe the statement true.² Letters of general administration, granted during the pendency of a contest respecting the probate of a will, or after probate, regardless of the executor, are null and void.³ And local statutes interpose reasonable delay to such grants of administration, in order to give full opportunity for the production of a will, so that the estate may be generally committed, if possible, according to the last expressed wishes of the deceased.

Death of the intestate is of course a fundamental requirement,⁴ and the grant of administration to any one is *prima facie*, though by no means conclusive evidence, that the death has actually occurred.⁵

So, too, as in the probate of a will, primary jurisdiction should be taken in the county where the deceased was domiciled or resided at the time of his death.⁶ But, inasmuch as public law treats the gathering in of a dead person's property as a matter of mutual convenience to creditors, kindred, and the State or Sovereign, statutes now in force in most civilized States or countries expressly provide for administration upon the estate of persons who die resident abroad, leaving prop-

¹ Part I.; Wms. Exrs. 401-404; English Stat. 20 & 21 Vict. c. 77 (court of probate act of 1857).

² Bulkley v. Redmond, 2 Bradf. Sur. 281.

³ Slade v. Washburn, 3 Ired. 557; Ryno v. Ryno, 27 N. J. Eq. 522; Landers v. Stone, 45 Ind. 404. But see *post* as to letters of special administration.

⁴ Jochumsen v. Suffolk Savings Bank,

3 Allen, 87; D'Arusment v. Jones, 4 Lea, 251.

⁵ Monroe v. Merchant, 26 Barb. 383; Sims v. Boynton, 32 Ala. 353; Peterkin v. Inloes, 4 Md. 175; Moore v. Smith, 11 Rich. 569.

⁶ This, if the decedent's domicile be otherwise uncertain, is generally assumed as in the State or county where he died. Leake v. Gilchrist, 2 Dev. 73.

erty to be administered within the domestic jurisdiction. In such a case, the grant having no extra-territorial force, and the State showing solicitude for the rights of foreign parties in interest, if there be such, the existence of *bona notabilia* or local assets is taken, nevertheless, to confer the jurisdiction, regardless of domicile.¹ Hence original general administration may be granted upon either of two distinct grounds: (1) last domicile or residence; or (2) in case of non-residence, assets within the local jurisdiction.

§ 92. **Presumption favors Jurisdiction where the Grant is conferred; but the Fundamental Facts must exist.** — In general, the county court of probate will be presumed to have exercised its jurisdiction lawfully and upon satisfactory evidence of the essential facts. And this jurisdiction is not usually to be attacked in collateral proceedings, but the order granting administration must be reversed on appeal, or the letters themselves revoked or vacated.² But, if the person upon whose estate letters were issued proves not to have died in fact, the grant is without jurisdiction.³ Nor can a county court rightfully grant administration, unless either the deceased was domiciled (or resident) therein, at the time of his decease, or, if a non-resident, has left suitable property in the county to be administered upon.⁴

¹ See *post* as to public administrators; *supra*, § 24; *Little v. Sinnett*, 7 Iowa, 324. Generally, personal estate is requisite for conferring such jurisdiction; or estate, at least, which in a due course of administration would be converted into personalty. *Crosby v. Leavitt*, 4 Allen, 410; *Grimes v. Talbert*, 14 Md. 169; *Thumb v. Gresham*, 2 Met. (Ky.) 306; *Jeffersonville R. v. Swayne*, 26 Md. 477; *Boughton v. Bradley*, 34 Ala. 694; *supra*, § 28.

² *Roderigas v. East River Savings Inst.*, 63 N. Y. 460; *Hobson v. Ewan*, 62 Ill. 146; *McFeeley v. Scott*, 128 Mass. 16. This subject will be more fully considered *post*.

³ *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87; *Moore v. Smith*, 11 Rich. 569; *Hooper v. Stewart*, 25 Ala. 408; *D'Arusment v. Jones*, 4 Lea, 251. The person whose estate was committed to administration may claim, if alive, that his property was taken without due process of law. *Labin v. Emigrant Bank*, 18 Blatchf. 1; *Burns v. Van Loam*, 29 La. Ann. 560. Sentence of a person to imprisonment for life does not justify the grant of administration upon his estate as of one "civilly dead." *Frazer v. Fulcher*, 17 Ohio, 260.

⁴ As to bringing property into the jurisdiction, see *supra*, § 26.

§ 93. **Value or Kind of Estate, whether Fundamental.** — Under some American statutes a limitation of value is set to the grant of original administration, so that the court cannot grant letters, unless there appears to be estate of the deceased amounting, at all events, to a specified sum, as for instance twenty dollars, or unpaid debts of that value.¹ But apart from express acts of this tenor, no such particular amount appears requisite; and in Massachusetts, legislation restrains only the grant of administration *de bonis non* in this manner.² Where there are debts due from the estate, and no personal property but only real estate left by the deceased, there is usually a probate jurisdiction, provided the real estate can be made to respond for such debts.³ In general, the existence of assets within the State or country is essential only when the jurisdiction concerns the estate of a non-resident deceased person, the situation of estate being here the test, but in principal grants simply the last residence or domicile of the deceased.⁴

§ 94. **Time within which Original Administration must be applied for.** — Statutes are found which expressly limit the time within which original administration must be applied for. Thus, in Massachusetts, such administration cannot (with a certain reservation) be granted after twenty years from the death of the person whose estate is concerned;⁵ though no such limits are set to the probate of a will.⁶ English practice requires any delay longer than three years in applying for letters to be satisfactorily explained, whether the application be for letters testamentary or of administration.⁷

¹ Bean v. Bumpus, 22 Me. 549.

² Pinney v. McGregory, 102 Mass. 89, *per* Gray, J.; Jochumsen v. Willard, 3 Allen, 87. And see as to estates worth less than \$300, Ind. statute referred to in Pace v. Oppenheim, 12 Ind. 533.

³ Little v. Sinnett, 7 Iowa, 324; Murphy v. Creighton, 45 Iowa, 179.

⁴ Harlan, Estate of, 24 Cal. 182; Watson v. Collins, 37 Ala. 587; § 24, *supra*.

⁵ Mass. Gen. Stats. c. 94, §§ 3, 4.

There is the express reservation that when property accrues to the estate or first comes to the knowledge of a person interested after twenty years, administration may be applied for, as to such property, within five years. *Ib.* See Parsons v. Spaulding, 130 Mass. 83.

⁶ *Supra*, § 56; Shumway v. Holbrook, 1 Pick. 114.

⁷ Wms. Exrs. 7th ed., 452, 453; 3 Hagg. 565. And see Townsend v.

§ 95. **No Original and General Administration granted while Other Letters are in Full Force, etc.; Double Jurisdiction.** — There can be, of course, no grant of original and general administration, while other letters granted and confirmed as of a testate estate or to an original administrator remain in full force within the same general jurisdiction.¹ And hence the rule, convenient where local assets may confer double jurisdiction, that when a case is within the jurisdiction of the probate court in two or more counties, the court which first takes cognizance thereof by the commencement of proceedings shall retain the same, and the competent administration first granted shall extend to all the estate of the deceased in the State, so as to exclude the jurisdiction of every other country.²

Real estate, to be appropriated to the payment of a debt of the decedent, may perhaps require a local appointment of administrator under the rule of *situs*;³ but, notwithstanding such appointment, an administrator, appointed in the local jurisdiction where the decedent resided, becomes the principal and primary administrator, and entitled as such to the personal assets.⁴

§ 96. **Judicial Inquiry into the Facts Essential to the Grant of Administration.** — Letters of administration are issued by the court in many States, upon the mere allegations of the petitioner, aided by the public nature of the proceedings, and the requirement of a bond for general security. Where such is the practice, the grant itself must needs afford very little

Townsend, 4 Coldw. 70, which makes exceptions after twenty years in favor of those who were infants or married women when the death occurred. Under the Texas act of 1870 no such administration can be granted after four years have elapsed from the death of the intestate. *Lloyd v. Mason*, 38 Tex. 212. But in North Carolina an administrator may be appointed at least ten years after the intestate's death, notwithstanding the next of kin possessed the property meantime. *Whit v. Ray*, 4 Ired. 14. In Pennsylvania, letters

should not be issued after twenty years, except under statute qualifications. But as to the effect of so issuing, see *Foster v. Commonwealth*, 35 Penn. St. 148.

¹ *Landers v. Stone*, 45 Ind. 404; *Slade v. Washburn*, 3 Ired. L. 557.

² Mass. Gen. Stats. c. 117; *Smith Prob. Pract. (Mass.)* 6.

³ See *post* as to administrator's dealings with real estate.

⁴ *Chamberlin v. Wilson*, 45 Iowa, 149; *post*, as to ancillary administration, etc.

proof of the facts essential to jurisdiction, unless those facts were controverted; and the administrator should act accordingly, under a full sense of the perilous responsibilities with which he has been invested. But the probate judge in each case has sound discretion to investigate and determine as to death and other facts fundamental to the grant of administration; and in some States the judicial nature of the inquiry in the probate court, and the necessity of requiring due proof, appear to be strongly insisted upon.¹

§ 97. **Persons to whom General Administration is granted.** — The appointment of administrators, both in England and the United States, is founded upon the statute 31 Edw. III. c. 11; local legislation at the present day, however, expressly regulating the whole subject. The policy of this statute in connection with a later one, passed during the reign of Henry VIII.,² both ante-dating the settlement of the American colonies, was to depute administration to those most directly interested in the estate, in case the deceased himself had made no choice by a will. "The next and most lawful friends of the dead person intestate," was the language of the first of these statutes, which took the right of administering away from the clergy. Stat. Hen. VIII. c. 5, § 3, conferred upon the ordinary a right to exercise discretion as between widow and next of kin, and in case various persons equal in degree of kindred should desire the administration.³

The fundamental principle of both English and American enactments now in force on this subject is, that the right to administer, wherever the deceased chose no executor, shall go according to the beneficial interest in the estate; a principle which may yield, however, to other considerations of sound policy and convenience.

¹ See *Roderigas v. East River Savings Inst.*, 63 N. Y. 460; *Bulkley v. Redmond*, 2 Bradf. Sur. 281; *Vogel, Succession of*, 16 La. Ann. 13; *Burns v. Van Loan*, 29 La. Ann. 560. It is not enough, in New York State, to give the surrogate jurisdiction, so as to render the person appointed even a *de facto*

administrator, that the appointment was made upon the petitioner's averment that, to his best knowledge, information, and belief, M. was dead, with no other proof of death. *Roderigas v. East River Savings Inst.*, 76 N. Y. 316.

² Stat. 21 Henry VIII. c. 5, § 3.

³ Wms. Exrs. 409, 436.

§ 98. **Husband's Right to Administer upon the Estate of his Deceased Wife.** — It was part of the common law which divested the wife of her personal property for her husband's benefit, and merged her status in his, that on her death, leaving a husband surviving, the latter could rightfully administer her estate to the exclusion of all kindred. The foundation of this claim has been variously stated; some have thought it derived from the statute 31 Edw. III., he being her "next and most lawful friend"; while others deduce it from the fundamental law of coverture, with whose general scope it fully harmonizes. The right is confirmed, both in England and in many parts of the United States, by modern statutes, and constitutes an exception to the usual rule of administration upon the estate of intestates.¹ Often, under the theory of coverture, there was no occasion for a husband to administer upon his deceased wife's estate at all; her personality was his if recovered during her life, and he had to respond personally for her debts irrespective of her fortune; but administration might be necessary in order to sue or to reduce her *choses* into possession after her death.² The modern creation of a separate estate on the wife's behalf changes this old rule considerably; nor can the husband in these days be said to administer so exclusively for his own benefit as formerly.³ And owing to modern facilities for separation and divorce, and to the enlarged capacity given to the wife to act as a *feme sole*, and to acquire and dispose of property in her own right, the husband's privilege to administer upon his wife's estate in preference to kindred, whether for his sole benefit or in the interest of others, appears a precarious one.

Thus, in England, where a married woman lives separate from her husband under a protection order giving her the capacity to deal and be dealt with as a *feme sole*, administra-

¹ See Wms. Exrs. 410; Schoul. Hus. & Wife, § 405. This right is not an ecclesiastical, but a civil, right of the husband; a right, however, to be administered in the court of probate. Sir J. Nicholl in *Elliott v. Gurr*, 2 Phillim. 19.

² Schoul. Hus. & Wife, § 405. No administration was needful to entitle

the husband to that which he already possessed, by virtue of his marital rights, or to confirm his right to *choses in action* recoverable without the aid of the courts. *Whitaker v. Whitaker*, 6 John. 117; *Clough v. Bond*, 6 Jur. 50.

³ Schoul. Hus. & Wife, §§ 408, 409; Distribution, *post*.

tion will be granted upon her death to her next of kin, exclusive of the husband.¹ And in the United States may be found similar exceptions, founded in considerations of the husband's misconduct, where others are interested in the estate, and the court has a statute discretion in the matter of appointment.²

The wife's will, lawfully made and operating, may control a surviving husband's right to administer.³ And, in general,

¹ Worman, Goods of, 1 Sw. & Tr. 513; Stat. 20 & 21 Vict. c. 85. Such administration appears to be limited to the personal property the wife may have acquired since the husband's desertion. Wms. Exrs. 411. Administration has been granted to a guardian elected by her son, a minor, without citing the husband. Stephenson, Goods of, L. R. 1 P. & D. 285.

² See Coover's Appeal, 52 Penn. St. 427; Cooper v. Maddox, 2 Sneed, 135. And see *post* as to general incapacity for service as administrator, which may apply to a surviving husband as to any one else; and for limitation of the time within which the right should be asserted, *supra*, § 94.

In most parts of the United States the husband's exclusive preference to administer on his wife's estate is recognized by statute. See, upon this point, Hubbard v. Barcas, 38 Md. 175; Willis v. Jones, 42 Md. 422; Fairbanks v. Hill, 3 Lea, 732; Shumway v. Cooper, 16 Barb. 556; Happiss v. Eskridge, 2 Ired. Eq. 54; Clark v. Clark, 6 W. & S. 85. To deprive him of such right, the statute should be clear and positive in terms. A written agreement for separation, in contemplation of a divorce, with covenants as to property, will not be presumed to have intended a relinquishment of the right to administer in case the husband survives, nor will such construction be given, no divorce having been decreed. Willis v. Jones, 42 Md. 422. Nor will an ante-nuptial settlement for the wife's benefit. Hart v. Soward, 12 B. Mon. 391. Nor the fact

of non-residence. Weaver v. Chace, 5 R. I. 356.

But in some States the husband is not entitled to administer to the exclusion of the children. Randall v. Shraeder, 17 Ala. 333; Williamson, Succession of, 3 La. Ann. 261; Goodrich v. Treat, 3 Col. 408. This will become further apparent when Distribution is considered, *post*, and it is perceived that the surviving husband must share the estate with children or other kindred; for the general principle is that the right to administer follows the interest in the estate. An ante-nuptial settlement, properly worded, may exclude the husband's marital right in this respect. Ward v. Thompson, 6 Gill & J. 349; Fowler v. Kell, 22 Miss. 68; Schoul. Hus. & Wife, § 363. The Massachusetts statute makes express reservation where, by force of a testamentary disposition or otherwise, the wife has made some provision which renders it necessary or proper to appoint some one else to administer. Mass. Pub. Sts. c. 130.

³ Wms. Exrs. 415. See Schoul. Hus. & Wife, §§ 457-470; 1 Redf. Wills, 22-30, as to the wills of married women in modern practice. The wife's choice of executor under her will, if rightfully made in conformity with rules of equity or a modern statute, is to be respected. As to the effect of her will naming no executor, etc., see *post*, administration with the will annexed. But the wife's will, if limited in operation, calls for a limited probate, and administration of the rest should be granted to her husband. Wms. Exrs. 415; Stevens v. Bagwell, 15 Ves. 139.

that the husband may be preferred in the trust, it is assumed that he is both competent and willing to exercise it.

Both in England and the United States, if a marriage were voidable only and not annulled before the wife died, the surviving husband was always entitled to administer;¹ but if utterly void, or annulled during their joint lives, the man was no surviving husband at all, and could claim no rights as such.² On principle, too, while the husband's right to administer would seem not to be forfeited by a mere decree of judicial separation or divorce from bed and board,³ a divorce absolute, or from the bonds of matrimony, annihilates the right with the marriage relation.⁴

§ 99. **Widow's Right to Administer upon the Estate of her Deceased Husband.**—The surviving wife's right to administer on her husband's estate is not, under most statutes which regulate the grant of general administration, co-extensive with the right of a surviving husband. The husband in the one instance is preferred to all others; but in the other (to quote from statute 21 Hen. 8, c. 5, § 3), administration shall be granted 'at the court's discretion, "to the widow or the next of kin or to both," so that kindred and the widow stand apparently upon an equal footing, though not unfrequently parties adverse in point of fact. Such is the rule of England;⁵ and it prevails in most parts of the United States.⁶ As we shall see hereafter, the division of interests as between widow and kindred is its basis.

The widow must be actually and *bond fide* such, and the surviving wife, in order to be entitled to administer upon the estate of an intestate. The partner of a void marriage, or the survivor of a conjugal pair, absolutely and finally divorced

¹ Schoul. Hus. & Wife, § 13; Wms. Exrs. 411; Elliott v. Gurr, 2 Phillim. 19.

² Ib.; Browning v. Reane, 2 Phillim. 69.

³ Schoul. Hus. & Wife, § 563; 2 Bish. Mar. & Div. 5th ed. § 739; Clark v. Clark, 6 W. & S. 85.

⁴ Schoul. Hus. & Wife, § 559; 2 Bish.

Mar. & Div. 5th ed. § 725; Altemus's Case, 1 Ashm. 49.

⁵ Wms. Exrs. 416; Browning, Goods of, 2 Sw. & Tr. 634; Grundy, Goods of, L. R. 1 P. & D. 459; Widgery v. Tepper, 5 Ch. D. 516.

⁶ 2 Kent Com. 410, 411, and notes.

But see next section.

by a competent tribunal, can assert no such claim.¹ Divorce from bed and board, however, or a marriage simply voidable, works no forfeiture of the widow's statute right to administer; nor would voluntary separation of the pair;² yet the discretion of the court, here permitted, as between widow and kindred, may suffice to exclude the former whenever her past misconduct has rendered her unworthy of the trust, or from other cause her appointment is obviously unsuitable.³ Marriage settlements, too, may exclude the rights of one surviving spouse as well as the other.⁴ And we here consider, of course, simply the estate of a husband who dies intestate, leaving a widow mentally and otherwise competent, when we speak of her right to administer.

Notwithstanding the statute expression, English courts in modern practice select the widow to administer, in preference to the next of kin, unless good reason appears for appointing differently.⁵ As against next of kin of remote degree or creditors, the wife deserves the strongest consideration; and even children should respect a surviving parent. Administration may doubtless be granted to both widow and next of kin; but a sole and harmonious administration is always preferred in practice to a joint and divided one.⁶ Where letters are issued to the widow and one of the next of kin jointly, it is desirable that the other next of kin should consent to the co-appointment.⁷

¹ *O'Gara v. Eisenlohr*, 38 N. Y. 296; Schoul. Hus. & Wife, § 559; 2 Bish. Mar. & Div. 5th ed. § 739. But where a decree of division had been vacated and annulled after the husband's death, the widow was held to be competent. *Boyd's Appeal*, 38 Penn. St. 246.

² See Schoul. Hus. & Wife, §§ 13, 563; Wms. Exrs. 418; 3 Hagg. 217, 556; 2 Bish. Mar. & Div. 5th ed. § 725. One may leave a lawful widow, by remarrying after divorce. *Ryan v. Ryan*, 2 Phillim. 332. See also *Nusz v. Grove*, 27 Md. 391; *Odiorne's Appeal*, 54 Penn. St. 175.

³ And see as to the husband under corresponding circumstances, § 98.

Administration refused to a wife divorced from bed and board because of her adultery. *Davies, Goods of*, 2 Curt. 628; Wms. Exrs. 418. Stat. 20 & 21 Vict. c. 77, § 73, permits the refusal of administration to the widow under "special circumstances." See *Wells v. Brook*, 25 W. R. 463.

⁴ Schoul. Hus. & Wife, § 363; 2 Cas. temp. Lee, 560.

⁵ *Goddard v. Goddard*, 3 Phillim. 638; Wms. Exrs. 417. But with ancillary administration it might be otherwise. *Rogerson, Goods of*, 2 Curt. 656.

⁶ Wms. Exrs. 417; 1 Salk. 36.

⁷ *Newbold, Goods of*, L. R. 1 P. & D. 285.

§ 100. **Widow's Right to Administer; The Subject continued.**—The American rule as to the choice for administration between widow and kindred must be gathered from a variety of acts applicable in different States. There is, perhaps, on the whole, more disposition than in England to construe the statute literally; balancing the preference of widow and kindred more evenly, and according to the merits of each case, and granting administration to one or the other or jointly to both; regarding, moreover, that personal suitableness for the trust which we shall presently consider in its wider bearings.¹ A preference of the widow to children and other kindred is, however, expressly accorded by the statutes of New York and certain other States.² Where there are no children or descendants of children, the widow's distributive interest in the surplus of the estate may render her all the more preferable to kindred.³

English courts have held that the re-marriage of the widow is *per se* no valid objection to her claim to administer;⁴ but if children unite in their choice as against her, under such circumstances, it seems proper that they should at least have a co-administrator appointed.⁵ Both in England and the United States, where the widow is heir and distributee, and for aught that is known the only one, she will be appointed in preference to any stranger.⁶

§ 101. **Right of the Next of Kin to Administer; Consanguinity.**—Subject to the possible claims of surviving husband or widow, as already noticed, the right of an intestate's next of kin to administer, as well as to take the residue of the personalty by way of distribution after settling all claims, is paramount. These "next of kin," or "next and most lawful

¹ See *McClellan's Appeal*, 16 Penn. St. 110; *Smith's Probate Practice* (Mass.) 70.

² *Pendleton v. Pendleton*, 6 Sm. & M. 448; *Lathrop v. Smith*, 24 N. Y. 417. *McBeth v. Hunt*, 2 Strobb. 335; *Curtis v. Williams*, 33 Ala. 570.

³ In Tennessee, and in various other States (see *Distribution, post*), the widow

in such a case is entitled to the whole surplus of the personal estate after payment of the debts. *Swan v. Swan*, 3 Head, 163.

⁴ *Webb v. Needham*, 1 Add. 494.

⁵ See *ib.*

⁶ *Cobb v. Newcomb*, 19 Pick. 336; *Block, Succession of*, 6 La. Ann. 810.

friends" of the deceased (to use the language of the old statute¹) Lord Coke defines as "the next of blood who are not attainted of treason, felony, or have any other disability."²

In general, no one comes within the term "next of kin" who is not included in the provisions of the statutes of distribution hereafter to be detailed. And, as we have stated, the fundamental principle in the award of administration is that the right to administer upon the estate of an intestate follows the interest or right of property therein.³ Hence precedents under the one head may serve to establish a rule under the other. In most American States the statutes of distribution fix the order of preference among kindred with much precision.⁴ And the general rule is, that where there is neither husband nor wife of the intestate surviving, administration shall be granted to one or more of the distributees, if such be competent and desirous of serving.⁵

As between husband and wife, neither can, by virtue of the marriage relation alone, be regarded as next of kin to the other, for they are not blood relatives;⁶ and this reservation extends to all marriage connections. Consanguinity or kindred, in fact, is that relationship of persons which is derived from the same stock or a common ancestor and common blood in the veins. Consanguinity is either collateral or lineal. Collateral consanguinity is the relationship of persons descended from the same common ancestor, but not one from the other; as in the case of nephew, cousin, or even brother and sister. These spring from the same root or stock, but in different branches. Lineal consanguinity, on the other hand, is that relationship which exists where one is descended from the other, as between son or daughter, and the father or grandfather, and so directly upwards or downwards.⁷ A simple perpendicular line on the chart, against which names are written, shows the lineal kindred of any person deceased

¹ 31 Edw. 3, c. 11.

² 9 Co. Rep. 39 b.

³ 3 Atk. 422; *per* Sir John Nicholl, Gill, Goods of, 1 Hagg. 342; Wms. Exrs. 7th Eng. ed. 419, and *n.* by Perkins.

⁴ See *post*, Distribution.

⁵ *Hawkins v. Robinson*, 3 B. Mon. 141.

⁶ *Watt v. Watt*, 3 Ves. 244; 2 Kent Com. 136, 142; *Whitaker v. Whitaker*, 6 Johns. 112.

⁷ 2 Bl. Com. 202.

intestate; while connecting lines, centred at some preceding name, exhibit the collateral kindred.¹

§102. **The same Subject; How to ascertain the Preference among Kindred.**—In order to ascertain who are next of kin and lawfully preferable for administration, we reckon on such a chart from the deceased intestate to the nearest in degree of blood surviving him. By the rule alike of the civil, canon, and common law, every generation in the direct course of relationship makes a degree for computing the degree of lineal consanguinity; or, in other words, we are to count either directly upwards or directly downwards to the nearest relative who survived the deceased. Father and son are both in the first lineal degree; grandfather and grandson both in the second. Collateral consanguinity, according to the preferable method, is computed by a similar process, extended into the diverging lines; that is to say, we count upwards to the common ancestor of both the deceased and the surviving kinsman, and then follow the branch downwards until the kinsman is reached, reckoning one degree for each generation. The civil law took, thus, the sum of the degrees in both lines to the common ancestor, so as to point out the actual degree of kindred in all cases; our English canon law, though less exact, arrived at the same general result.² Hence, following the civil method, we pronounce the intestate's brother in the second degree, both his uncle and nephew in the third degree, and his cousin in the fourth.³

Other rules in this connection deserve our consideration.

(1) Relatives of the deceased by the father's side and the

¹ 2 Bl. Com. 203–205. See table of consanguinity at the end of this volume.

² See 2 Bl. Com. 202, 207. By our canon law, the numbering of degrees was different where collateral consanguinity was reckoned; for the rule was to begin with the common ancestor and reckon downwards; and the degree the two persons, or the more remote of them, was distant from the ancestor, was taken to be the degree of kindred subsisting between them. For instance,

two brothers were said to be related to each other in the first degree, and an uncle and nephew in the second. *Ib.*, Christian's note. Chancery judges charge the canonists with reckoning degrees of kindred so closely in order to increase their trade in selling dispensations of marriage. *Prec. Ch.* 593, *per* Sir J. Jekyl; Lord Hardwicke in 1 *Ves. Sen.* 335; *Wms. Exrs.* 421, note.

³ See table of consanguinity at end of volume.

mother's side stand in equal degree of kinship,¹ so that, in tracing out pedigree beyond one's immediate family, two trees may be required for comparison. (2) Half-blood must be reckoned as, on principle and save for those feudal disabilities at the common law which had reference to the inheritance of lands, entitled equally with the whole blood; so that the half-brother stands in higher degree than the full uncle.² (3) Primogeniture gives no preference of administration among kindred of the same degree, as matter of right; and, indeed, in the United States the modern rule is to dispense altogether with legal distinctions in favor of the first-born of a family.³ (4) The right to administer, as to kindred, will follow the proximity of kindred; and kindred of the nearest degree accordingly take precedence over those more remote, as the true "next of kin." Thus, if one dies leaving no children, but parents, these are of the first degree by reckoning; and their rights are accordingly superior to those of brother and sister, who occupy the second degree.⁴ Indeed, the rights of parents in such a case are theoretically paramount and equal. But the old doctrines of the common law forbade the theory that mother and father should have equal title as parents;⁵ and the English statute 1 Jac. 2, c. 17, moreover, which has been re-enacted in numerous American States, retrenches the rights formerly accorded to a mother as the only surviving parent, by distributing the estates of intestates equally between mother, brothers, and sisters, where there is no surviving father.⁶ Following the proximity of kindred, the grandparent excludes the uncle or aunt, being nearer in degree.⁷

¹ Wms. Exrs. 422; 1 P. Wms. 53. Local statutes sometimes discriminate in favor of relatives on the father's side. *Kearney v. Turner*, 28 Md. 408.

² 1 Vent. 424. And see 2 Bl. Com. 505. To this, however, are found statute exceptions in favor of the whole blood. And, among those of equal degree, whole blood kindred are usually selected to administer in preference to those of the half blood. *Stratton v.*

Linton, 31 L. J., P. M. & A. 48; Wms. Exrs. 427.

³ Wms. Exrs. 423; 1 Phillim. 124; *Distribution, post*; *Shomo's Appeal*, 57 Penn. St. 356.

⁴ 1 P. Wms. 51; Wms. Exrs. 423; *Brown v. Hay*, 1 Stew. & P. 102.

⁵ See next section.

⁶ Wms. Exrs. 423; *Distribution, post*.

⁷ *Ib.*; 1 P. Wms. 45; 1 Ld. Raym. 686.

§ 103. **The same Subject; Preferences among Kindred of the same Degree, etc.** — It is plain that one may die leaving various parties related to him in the same degree of kindred, but in different classes, and without any common bond of affection. Further rules of discrimination have, therefore, been established, for convenience. A certain preference among kindred, in fact, is regarded, in according rights of administration, as well as in legal descent and distribution; natural affection and the natural instincts of family influencing, no doubt, such a selection. Thus, should one die, leaving a child or children, these among kindred are the closest to him; and though of the same degree as his father or mother, they should be preferred.¹ And the same consideration gives precedence to lineal descendants in the remotest degree; or, in other words, the stock one has founded takes the priority of that from which he was derived.² As between one's own brothers and sisters and his grandparents, though both classes are of the second degree, yet the ties are knit less closely in the latter case than in the former; hence, and to avoid dispersion of the estate among more remote branches of the family, brothers and sisters are preferred.³

All these discriminations are fundamental in English and American law. Others may be traced, in the legislation of certain States, which are founded in reasons less forcible, and operate by virtue of local laws, mostly of an experimental character. To this latter class may be referred the preference, in case both parents survive the intestate, which the father takes over the mother; a preference so ingrained in the common law, that, except for the modern tendencies of legislation, we should include it in our preceding paragraph among fundamental discriminations.⁴ For, when a child dies intestate without leaving wife or issue, his father, if there be one living, is still usually entitled to administer, as next of kin, exclusive of all others;⁵ while a mother receives con-

¹ 2 Bl. Com. 504; *Withy v. Mangles*, 4 Beav. 358.

² *Evelyn v. Evelyn*, 3 Atk. 762; s. c. Amb. 191.

³ *Evelyn v. Evelyn*, *supra*; 1 P. Wms. 45; Wms. Exrs. 424.

⁴ Wms. Exrs. 423; *Blackborough v. Davis*, 1 P. Wms. 51. And see as to Distribution, *post*.

⁵ *Aleyn*, 36; Wms. Exrs. 424.

sideration only when the widowed mother, nor always then as against the other children.¹ Next, as between lineal and collateral kindred, the civil law, without respect of degree, preferred the former in every case, except that of brothers and sisters; while the common law selects the collateral of nearer degree, rather than the lineal of more remote; and this, too, is matter of statute definition in various States.² There are limits to the right of representation (or where the descendant stands in place of ancestor, among those of the ancestral degree), as we shall see hereafter; but whether entitled to take the ancestor's share in the final distribution or not, the issue may well be subordinated in the grant of administration.³

While it is a maxim that the persons entitled to participate in distribution have also the right to administer, it nevertheless happens often that the person designated by the statute to administer in preference may have disproportioned rights in the estate, or perhaps no beneficial right therein at all.⁴ But where the statute does not settle the right to administer, the question, who is entitled to the surplus of the intestate's personal estate, must generally be the practical test.⁵

§ 104. **Leading Considerations which affect the Choice among Persons equally entitled by Law to administer; Suitableness, etc.** — As among the next of kin, or persons all of the same class in respect of a legal right to administer, the actual choice of administrator by the court may be guided by various considerations. Personal suitableness, for instance, is a very important element, whether in determining the appointment as between the widow and next of kin of an intestate, or where one or more next of kin alone are concerned. Favorably as our law treats the widow's claim to administer, even though the intestate's next of kin were his own children,⁶ a widow evidently

¹ *Supra*, § 102.

⁴ *Lathrop v. Smith*, 24 N. Y. 417.

² 1 P. Wms. 58; Wms. Exrs. 424. But as to lineal descendants, see *supra*, p. 133.

⁵ *Sweezy v. Willis*, 1 Bradf. Sur.

495.

³ Administration is to be granted to the daughter in preference to the son of the eldest son of the intestate. *Lee v. Sedgwick*, 1 Root, 52.

⁶ *Supra*, § 100; *McGooch v. McGooch*, 4 Mass. 348; *Sears v. Wilson*, 5 La. Ann. 689; *Pendleton v. Pendleton*, 14 Miss. 448.

unsuitable may be passed over in favor of the next of kin; but if the next of kin are all unsuitable, the widow, being competent, is entitled to the sole administration; while, if both widow and next of kin are unsuitable, the application of all should be refused.¹ And so, too, where only next of kin of a certain class are concerned in the administration, if one is suitable and the others are unsuitable, the suitable one will be taken; if two or more are equally entitled, equally suitable, and equally strenuous to be appointed, the court has power to appoint one or more of them; but if all are unsuitable, the appointment must be otherwise bestowed. From among two or more persons equally akin to the deceased, the court may choose the most suitable at discretion.²

As to suitability, there are numerous decisions, just as there are various kinds and degrees of unsuitableness. Separation of husband and wife, apart from the question of fault, does not, we have seen, disqualify one from administering on the estate of the other. Nor, as it is held, does inability to read or write render one an unsuitable administrator.³ Neither illiteracy nor narrow means necessarily makes one unsuitable.⁴ Nor habits of intemperance.⁵ Nor the bare fact of intermeddling with the effects before appointment.⁶ Nor that the party in interest is a nun or priest.⁷ But, as between individuals of the same class, moral fitness and integrity may well be considered in the selection;⁸ also efficiency of mind and body; also business habits and experience in the management of estates.⁹ A bankrupt or an insolvent is an unsuitable person for the trust of administrator, especially if embarrassed habitually.¹⁰ One may be considered unsuitable

¹ *Stearns v. Fiske*, 18 Pick. 24. Suitableness is an element of especial importance in States which have legislated on this point.

² See *past* as to administration during minority. *Taylor v. Delancey*, 2 Cai. (N. Y.) Cas. 143; *Moore v. Moore*, 1 Dev. (N. C.) 268.

³ *Nusz v. Grove*, 27 Md. 391; *Altamus's Case*, 1 Ashm. 49.

⁴ *Emerson v. Bowers*, 14 N. Y. 449.

⁵ *Elmer v. Kechele*, 1 Redf. (N. Y.) 472.

⁶ *Bingham v. Crenshaw*, 34 Ala. 693.

⁷ *Smith v. Young*, 5 Gill, 197.

⁸ *Coope v. Lowerre*, 1 Barb. Ch. 45; *McMahon v. Harrison*, 6 N. Y. 443.

⁹ *Stephenson v. Stephenson*, 4 Jones L. 472; *Williams v. Wilkins*, 2 Phillim. 100.

¹⁰ *Cornpropst's Appeal*, 33 Penn. St. 537; *Bell v. Timiswood*, 2 Phillim. 22. Cf. *Tilley v. Trussler*, 26 W. R. 760.

for the appointment, who holds already some other trust, whose interests decidedly conflict with those of the estate in question.¹ Or who is largely indebted to the estate, especially if the amount due has not been ascertained. Or who was partner of the deceased at the time of his death.² Or who is otherwise so adversely interested to heirs, creditors, or other kindred, as to prejudice the due settlement of the estate, if placed under his charge.³ For the administrator should be interested in settling the estate, not unfaithfully or partially, but faithfully, and for the welfare of all concerned.⁴

Unsuitableness is not overcome by the fact that the party personally unsuitable is ready to give ample bonds with sureties for the faithful performance of his trust; though this is doubtless of great advantage to overcome a doubt. For it is just neither to parties in interest nor to those offering to become bondsmen, that in an office of trust the chief reliance must be placed upon the security, instead of the principal; nor can remedies for mismanagement compensate for detriment suffered through the want of good management.⁵

§ 105. **The same Subject; Suitableness as between Males and Females, the Elder and Younger, etc.**—Next, we observe, that by the old rule males have no legal preference over females, in the grant of administration to the next of kin, though in the succession of lands feudal law pronounced otherwise. But on practical considerations of suitableness, where the settlement of an estate is involved and various kindred are to be protected, woman herself generally desires a man's management; and hence, aside from the discretionary choice of a court,

¹ *State v. Reinhardt*, 31 Mo. 95. Cf. *Wright v. Wright*, 72 Ind. 149.

² *Cornell v. Gallaher*, 16 Cal. 367; *Brown's Estate*, 11 Phila. (Pa.) 127.

³ *Pickering v. Pendexter*, 46 N. H. 69; *Moody v. Moody*, 29 Ga. 515; *Heron, Estate of*, 6 Phila. (Pa.) 87. The fact that one of the kindred is a creditor is rather unfavorable than favorable to his selection. *Webb v. Needham*, 1 Add. 494.

⁴ The New York statute declares

that letters shall not be granted to any person adjudged to be incompetent to execute the trust "by reason of drunkenness, improvidence, or want of understanding." See *McMahon v. Harrison*, 6 N. Y. 443. Some statutes appear to extend the incompetency which may arise from illiteracy and ignorance of accounts and business. *Stephenson v. Stephenson*, 4 Jones L. 472.

⁵ See *Stearns v. Fiske*, 18 Pick. 27.

there are American statutes which distinctly place the male next of kin before the female, for receiving the appointment.¹ So may it be thought fit that the younger should yield to the older under some circumstances.²

§ 106. **Suitableness as concerns Married Women; Husband's Administration in Wife's Right.** — Local statutes are also found to give unmarried women the appointment in preference to married women.³ Legislation may debar the husband of a woman who is entitled to administer from succeeding by the marriage to her right.⁴ But the old and familiar rule, English and American, is that, while property held by the wife in a representative capacity at the time of marriage cannot vest personally in the husband, he acquires, nevertheless, the right to perform her trust, on the assumption that she becomes incapacitated by marriage from performing it. In this sense it is said that if the wife be executrix or administratrix at the time of her marriage, the husband may administer in her right.⁵ Changes in this doctrine are introduced by modern equity, and the married women's acts; thus, the wife may be sole fiduciary, in England and some American States, with her husband's consent,⁶ or perhaps without it;⁷ and pro-

¹ 2 N. Y. Rev. Stat. 74, § 28; *Cook v. Carr*, 19 Md. 1. But other considerations, such as minority or non-residence of male relatives, may control this wise rule. *Wickwire v. Chapman*, 15 Barb. 302.

² *Wms. Exrs.* 427; 1 Phillim. 125; 4 Hagg. 376. Though not, of course, in any such sense as to set up the rule of primogeniture.

³ 2 N. Y. Rev. Stat. 74, § 28; *Owings v. Bates*, 9 Gill, 463. This preference applies where the intestate leaves two daughters, one of whom is married and the other is not. *Smith v. Young*, 5 Gill, 197. But under the New York act of 1867, married women are to be treated like single women in respect to the right to administer. *Curser, Re*, 25 Hun (N. Y.) 579; 14 Rep. 408.

⁴ *Richards v. Mills*, 31 Wis. 450; *Barber v. Bush*, 7 Mass. 510.

⁵ Schoul. *Hus. & Wife*, § 163; *Dardier v. Chapman*, L. R. 11 Ch. D. 442; *Woodruffe v. Cox*, 2 Bradf. Sur. 153; *Keister v. Howe*, 3 Ind. 268; *Ferguson v. Collins*, 8 Ark. 241; *Pistole v. Street*, 5 Port. (Ala.) 64.

⁶ *Stewart, In re*, 56 Me. 300; *Binnerman v. Weaver*, 8 Md. 517; *Wms. Exrs.* 450; Schoul. *Hus. & Wife*, appendix. A woman appointed administratrix while sole is permitted by some codes to resign her trust on her marriage. *Rambo v. Wyatt*, 32 Ala. 363.

⁷ Administration granted to a wife living apart from her husband under a deed of separation. *Hardinge, Goods of*, 2 Curt. 640. And see *Maychell, Goods of*, 26 W. R. 439.

vision is made for the husband's joinder in his wife's official bond.¹

If the wife be executrix or administratrix, and dies intestate, administration *de bonis non* as to such estate is proper; and parties in interest have the right to be considered for the new appointment, rather than her surviving husband.² The same effect is sometimes given by statute to the marriage of a single woman.³

§ 107. **Unsuitableness as to Insane Persons; Infants; Corporations, etc.** — Insane persons are doubtless unsuitable for the personal trust of administrator, and, indeed, incompetent to serve.⁴ So, too, are infants.⁵ A corporation cannot lawfully be appointed, unless the right to administer has been expressly conferred in its charter.⁶ In general a *cestui que trust*, if natural and competent, is entitled rather than his trustee.⁷ The usual disqualifications of an executor extend to administrators; and other disqualifications are sometimes annexed.⁸

§ 108. **Illegitimate Children and their Right to Administer.** — As to illegitimacy, the peculiar rules of distribution, as defined by statute, must be applied for determining the right to administer; whether the case be one of an illegitimate decedent or of illegitimate relationship to a decedent.⁹

¹ *Airhart v. Murphy*, 32 Tex. 131; *Cassedy v. Jackson*, 45 Miss. 397.

² 3 Salk. 21; *Wms. Exrs.* 416. See *Risdon, Goods of*, L. R. 1 P. & D. 637.

³ See Mass. Gen. Stats. c. 101, § 1, which specifies, as a proper case for granting administration *de bonis non*, that of the marriage of a single woman who is sole executrix, etc. And see next chapter as to administration *de bonis non*. A married daughter's right to administer her father's estate, if not unfit, is conceded in *Guldin's Estate*, 81 Penn. St. 362.

⁴ *McGooch v. McGooch*, 4 Mass. 348. And see New York statute construed in *McMahon v. Harrison*, 6 N. Y. 443.

⁵ See *post* as to administration during minority. And see *Carow v. Mowatt*, 2 Edw. (N. Y.) 57; *Collins v. Spears*,

1 Miss. 310. That the minor is married does not qualify her. *Briscoe v. Tarkington*, 5 La. Ann. 692. Nor that there is no other next of kin capable to administer. *Rea v. Englesing*, 56 Miss. 463.

⁶ *Thompson's Estate*, 33 Barb. 334.

⁷ *Ib.*

⁸ 1 *Wms. Exrs.* 449 mentions attainder of treason or felony, outlawry, etc. The statute of New York enumerates among other special disqualifications, the conviction of an infamous crime. See *McMahon v. Harrison*, 6 N. Y. 443. And see Stat. 33 & 34 Vict. c. 23; *Wms. Exrs.* 435.

⁹ See *Public Administrator v. Hughes*, 1 Bradf. 125; *Pico's Estate*, 56 Cal. 513; *Ferrie v. Public Administrator*, 3

§ 109. **Whether Non-residence disqualifies.**—Non-residence is an objection to the appointment;¹ but in practice not usually a decisive one, especially as between residents in different parts of the United States. Some States permit the non-resident next of kin to serve as administrator upon duly qualifying with resident sureties; and in Massachusetts such an administrator must further appoint a resident attorney who shall accept service on his behalf and in general represent him.² So might the resident nominee of a non-resident kinsman be taken where no suitable kinsman within the State desired to administer.³ Alienage is considered no incapacity in England as concerns personal estate; but some American statutes exclude or restrict the right of aliens to administer.⁴ As among next of kin, some resident and some non-resident, those resident, if otherwise suitable, would seem worthy of a preference. Where in fact several persons are of the same degree of kindred to the deceased, one living out of the State is not entitled to administration as of right; but in case those living in the State are unsuitable, upon stronger grounds, the non-resident may, at the discretion of the court, be appointed upon the non-residence terms.⁵ English practice recognizes the grant of administration to the attorney of next of kin residing abroad.⁶

§ 110. **Other Considerations for determining the Choice of Administrator.**—One determining consideration between next of kin, in cases of doubt, may be their relative extent of interest.⁷ But another important one is, the confidence reposed by kindred; and hence, in cases of conflict, it is not unfrequent to appoint the one upon whom a majority of the

Bradf. 249; Schoul. Dom. Relations, § 276; Wms. Exrs. 433; Goodman, *Re*, L. R. 17 Ch. D. 266.

¹ Child *v.* Gratiot, 41 Ill. 357; Radford *v.* Radford, 5 Dana, 156; Wickwire *v.* Chapman, 15 Barb. 302.

² Mass. Public Stats. c. 132, § 8; Robie's Estate, Myrick (Cal.) 226. And see Barker, *Ex parte*, 2 Leigh, 719; Jones *v.* Jones, 12 Rich. 623.

³ Smith *v.* Munroe, 1 Ired. L. 345. See *post* as to Public Administrator.

⁴ Wms. Exrs. 449; New York Stats., cited Redf. Surr. Pract. 138.

⁵ Pickering *v.* Pendexter, 46 N. H. 69.

⁶ Wms. Exrs. 439; Burch, Goods of, 2 Sw. & Tr. 139.

⁷ Leverett *v.* Dismukes, 10 Ga. 98.

parties in interest agree.¹ The wishes of the party or parties having the largest amount of interest may in other respects preponderate in the selection of administrator.² The party first seeking the appointment has some claim to preference.³ These, and the other considerations already set forth, which touch rather upon personal suitableness or competency for the trust, the court taking jurisdiction should duly weigh, where controversy has arisen, and grant the administration to such party or parties in the preferred class as shall seem most proper.⁴

§ 111. **Statute Order among Next of Kin stated.**—Following the computation of kindred already set out, and observing the preferences of interest, the codes of many States now specify in order the classes who shall be entitled to administer, if otherwise competent. After providing as to surviving husband or widow, they name first, children (with their lineal descendants, it may be presumed); next, the father; next, the mother (or else mother, brothers and sisters); next, if there are neither children nor parents, the brothers and sisters; next, the grandparents; next, nephews, nieces, uncles, aunts; next, first cousins.⁵

On principle, it would appear, that, as in distribution, the right to administer as “next of kin” is limited to the class which fulfils that description at the intestate’s death, and

¹ *Mandeville v. Mandeville*, 35 Ga. 243. This course is sometimes directed by statute. But it is an old established rule in English ecclesiastical practice. 1 Freem. 258; Wms. Exrs. 426; *Budd v. Silver*, 2 Phillim. 115. The rule is by no means invariable. *Wetdrill v. Wright*, 2 Phillim. 248. See also *Stainton, Goods of*, L. R. 2 P. & D. 212.

² *McClellan’s Appeal*, 16 Penn. St. 110.

³ *Cordeux v. Trasler*, 29 Jur. N. S. 587; Wms. Exrs. 427, 428.

⁴ In English practice, it is said, a sole administration is preferable, *ceteris paribus*, to a joint one, and a joint administration will never be forced. Wms. Exrs. 428; 2 Phillim. 22, 55; 4 Hagg.

376, 398. But where the estate is a large and intricate one to settle, the appointment of two or three administrators may be quite judicious in the interest of kindred, and in American practice the court may probably exercise a liberal discretion in this respect. See *Reed v. Howe*, 13 Iowa, 50.

⁵ See Wms. Exrs. 425; 2 Bl. Com. 305. The order under the New York statute is peculiar; viz.: first, the intestate’s widow; second, his children; third, his father; fourth, his mother; fifth, his brothers; sixth, his sisters; seventh, his grandchildren; eighth, any of the next of kin who would be entitled to share in the distribution of the estate.

takes the surplus; thus excluding more distant kindred not beneficially entitled.¹ But, according to the law of certain States, where the nearest of kin, from death or incompetency, cannot receive letters, the next in order appear to be entitled; kindred in a due turn of choice taking the absolute precedence of creditors or strangers.² Beyond the range of husband, wife, and distributees, who alone have the legal right to administer, the appointment in Mississippi is treated as within the ample discretion of the court.³ American statutes vary greatly in scope, however, and in each State the law must be construed according to the legislative expression.

§ 112. **Renunciation or Non-Appearance of those entitled by Preference to administer; Citation.** — Before creditors and strangers in interest can be admitted to the trust, it is usual to wait a reasonable time and require proceedings on the part of the petitioner tantamount to summoning those entitled by preference to appear and exercise their right if they so desire. For the rule, long established in ecclesiastical and probate practice, is that the party having a prior right should be cited or else waive his right before administration can be granted to any other person.⁴ The citation is sometimes by a personal service; but frequently, in our modern practice, by posters or a simple newspaper publication, the method being fixed by statute or rule of court, and the citation issuing from the register's office when the petition to administer is presented; the course being similar to that pursued in obtaining letters testamentary, and as preliminary to the formal hearing. To dispense with the citation, those of the

¹ Such is the rule in Massachusetts. *Cobb v. Newcomb*, 19 Pick. 337. And it is the English rule. *Wms. Exrs.* 437. Accordingly, if all who were next of kin at the time of the intestate's death are dead, then the representative of such next of kin, in default of some person originally in distribution, may receive the appointment. *Wms. Exrs.* 437; 2 *Hagg. Appendix*, 157.

² *Churchill v. Prescott*, 2 Bradf. 304;

Carthey v. Webb, 2 Murph. 2 N. C. 268; *Anderson v. Potter*, 5 Cal. 63; *McClellan's Appeal*, 16 Penn. St. 110.

³ *Byrd v. Gibson*, 2 Miss. 568.

⁴ *Wms. Exrs.* 440, 448; *Barker, Goods of*, 1 Curt. 592. For the English practice of citation, where the next of kin is insane, see *Windeatt v. Sharland*, L. R. 2 P. & D. 217. And see *Grier-son, In re*, 7 L. R. Ir. 589.

class entitled to preference should renounce their claim or signify their assent to the grant of the petitioner's request by indorsement upon the petition or other writing of record.¹

A similar procedure appears highly suitable where one of the class entitled to preference, desires an appointment, as against others of the same class and equal in right. But where several are equally entitled, and in general as among those from whom the court is free to select without disturbing a statute preference or violating legislative directions, the citation is sometimes dispensed with. A court is presumed to exercise its lawful discretion fairly in such a case; and although parties passed over, who have the statute priority, may have the administration set aside or reversed on appeal, when granted irregularly and in disregard of their lawful rights, the appointment, nevertheless, remains valid meantime, if the court had jurisdiction, and cannot be assailed, except directly and by the parties aggrieved.³

Renunciation or waiver of the right should appear of record in order to bind the parties first entitled to administer; nor is the language of such a writing to be strained beyond the obvious sense.⁴ Thus, where all the next of kin consent that one of them, A., shall serve if he can find security, and A., unable to give security, nominates a stranger, this does not comply with the condition.⁵

¹ Cobb v. Newcomb, 19 Pick. 336; Arnold v. Sabin, 1 Cush. 525; Talbert, Succession of, 16 La. Ann. 230; Torrance v. McDougald, 12 Geo. 526. The Massachusetts statute provides that administration of the estate of an intestate may be granted to his widow or next of kin, or both, as the probate court shall deem fit; and if they do not either take or renounce administration, they shall, if resident within the county, be cited by the court for that purpose. Cobb v. Newcomb, *supra*; Stebbins v. Lathrop, 4 Pick. 33. As to affidavit that citation was given, see Gillett v. Needham, 37 Mich. 143. A citation in South Carolina has sometimes been published by being read in church by an officiating clergy-

man. Sargent v. Fox, 2 McCord, 309. Some codes expressly insist that renunciation by those having prior right shall be in writing. Barber v. Converse, 1 Redf. (N. Y.) 330.

² See Widger, Goods of, 3 Curt. 55; Wms. Exrs. 448; Peters v. Public Administrator, 1 Bradf. (Sur.) 200. And see statute cited in Bean v. Bumpus, 22 Me. 549, as to dispensing with notice in certain cases.

³ See *past* as to effect of appointment, etc.

⁴ Arnold v. Sabin, 1 Cush. 525.

⁵ Rinehart v. Rinehart, 27 N. J. Eq. 475; McClellan's Appeal, 16 Penn. St. 110. It is held in England that where a party entitled to administer has

§ 113. **Nomination of a Third Person by the Person entitled to Administer.** — It is held that a renunciation of her claim by the widow does not give her the right to nominate another person to the exclusion of the next of kin.¹ Nor can kindred who waive the right to serve dictate the selection of a stranger.² But in Kentucky, the court, in granting administration to the widow, may, at her request, associate with her a stranger in blood to the intestate, although the blood relatives object.³ And in New York, where a widow renounced her right to administer her husband's estate, and recommended another person, all the children being minors, the appointment of her nominee was considered proper.⁴ Even granting, as we must, that the court is not bound by the nomination made by a widow or the kindred first entitled to administer, yet the wishes and preferences of those having the greatest interest in preserving the estate are entitled to great weight.⁵ And hence the appointment, at the court's discretion, of any suitable person upon whom the next of kin entitled to the office, or a majority of them may agree, is highly favored in American practice;⁶ the rights of more remote kindred creditors and all strangers in interest being postponed to their expressed choice accordingly. Where the next of kin reside abroad, their resident nominee may receive

renounced, such renunciation may be retracted at any time before the administration has passed the seal. *West v. Wilby*, 3 Phillim. 379. Probably under some of our American codes this would not be permitted, unless, at all events, good reason for the retraction was shown. See *Carpenter v. Jones*, 44 Md. 625; *Kirtlan, Estate of*, 16 Cal. 161. But executors and administrators appear to be alike favored in New York as under the English rule. *Casey v. Gardiner*, 4 Bradf. (N. Y.) 13.

The law will not sanction an agreement whose consideration is the relinquishment of the right to administration by one to the other. *Bowers v. Bowers*, 26 Penn. St. 74.

¹ *Cobb v. Newcomb*, 19 Pick. 332.

And see *Triplett v. Wells*, Litt. (Ky.) Sel. Cas. 49. Under Maryland statutes the right of administration cannot be delegated. *Georgetown College v. Browne*, 34 Md. 450.

² *Cresse, Matter of*, 28 N. J. Eq. 236; *Root, Re*, 1 Redf. 257.

³ *Shropshire v. Withers*, 5 J. J. Marsh, 210.

⁴ *Sheldon v. Wright*, 5 N. Y. 497. And this without citing kindred. *Ib.*

⁵ *McBeth v. Hunt*, 2 Strobb. (S. C.) 335; *McClellan's Appeal*, 16 Penn. St. 110.

⁶ *Mandeville v. Mandeville*, 35 Ga. 243; *Munsey v. Webster*, 24 N. H. 126; *Halliday v. Du Bose*, 59 Ga. 268.

the appointment;¹ any such attorney, so called, however, being responsible to all parties in interest.²

Inasmuch as the regular administration of estates, whether testate or intestate, is so highly favored at the present day, the selection of third persons of integrity, experience, and sagacity for such responsible duties must often be most desirable. And if a testator makes such a selection, or associates others with his next of kin or legatees in the trust, for reasons admittedly sound, there seems no good reason why the next of kin themselves, if the estate be intestate, should not exercise a corresponding discretion and nominate some trustworthy friend rather than forfeit all claim to administer by failing to qualify personally for the office.

§ 114. **Unsuitableness of a Judge of Probate, etc., for the Appointment.** — A judge of probate would be an unsuitable person to receive the appointment from his own hands or within his own jurisdiction; and delicacy, moreover, ought to prevent any judge from serving as administrator in an adjoining county, or at least where he might sometimes be called upon to hold a court; though probate judges in this country are not always found so scrupulous³ about taking advantage of their official position, to emulate the example of the early English bishops. Legislation should curb such temptations, and keep local judges of probate from throwing estates and probate business into one another's hands. Probably, for a judge to appoint himself administrator would be void, as against public policy.³ But as to the appointment of his own

¹ *Supra*, § 109; *Smith v. Munroe*, 1 Ired. L. 345; *Wms. Exrs.* 439; *Cotter's Estate*, 54 Cal. 215. But in other cases except for the "special circumstances," etc., under recent statutes, the right to select a third person appears not to be favored in English practice. See *Wms. Exrs.* 446, 447; Stat. 20 & 21 Vict. c. 77, § 73. Unless it be some one related to the family. *Tyndall, Goods of*, 30 W. R. 231. An impartial stranger may be preferable to widow or kindred where these are unsuitable. *Hassinger's Appeal*, 10 Penn. St. 454.

² *Chambers v. Bicknell*, 2 Hare, 536. But the court will not grant administration to the attorney-in-fact, where the party himself is resident in the jurisdiction, and able to take it himself. *Burch, In re*, 2 Sw. & Tr. 139. Where the sole next of kin was a married woman living apart from her husband, whose address was unknown, administration was granted with her consent to the trustees of her marriage settlement. *Maychell, Goods of*, 26 W. R. 439.

³ A judge of probate interested in the estate has no right to grant administra-

son by a judge of probate, it is recently held, that, although manifestly improper, such appointment is not void.¹

§ 115. **Right of Creditor or Stranger to be appointed in Default of Kindred, etc.** — A creditor having a right of action against the deceased is in most States the party entitled to administration on the intestate's estate, where the widow and next of kin refuse or neglect to apply, or are incompetent.² The New York statute specifies as to creditors, that the creditor first applying, if otherwise competent, shall have the preference.³ The largest creditor, or some principal creditor of the deceased, takes priority, according to the expression of other local codes.⁴ By English practice, too, a creditor may take out administration on an intestate estate, if none of the next of kin or others in legal priority do so; this rule resting in custom and not statute law, and the court frequently selecting a larger creditor instead of the creditor applying.⁵ In Texas, however, such "proper person" as will accept and qualify is designated, and it is held that a creditor as such has no special claim to the appointment over a confidant of the deceased not interested.⁶ Administration cannot in general be granted to a creditor or stranger until after the lapse of the time allowed for the application of the widow, next of kin, and others previously entitled and suitable, nor except upon their failure to pursue their rights, notwithstanding a due citation.⁷

tion. *Sigourney v. Sibley*, 22 Pick. 507. And see *Thornton v. Moore*, 61 Ala. 347.

¹ *Plowman v. Henderson*, 59 Ala. 559.

² *Mitchell v. Lunt*, 4 Mass. 654; *Stebbins v. Palmer*, 1 Pick. 71.

³ New York Laws, 1867, c. 782, § 6.

⁴ *Curtis v. Williams*, 33 Ala. 570. As to nomination of a third person by creditors, see *Long v. Easley*, 13 Ala. 239.

⁵ *Wms. Exrs.* 7th ed. 440-442; 2 Bl. Com. 505; 2 Cas. temp. Lee, 324, 502; *Maidman v. All Persons*, 1 Phillim. 53. The applicant must make affidavit as to

the amount, etc., of his debt, and that he has cited in the kindred. *Von Desen, Goods of*, 43 L. T. 532.

⁶ *Cain v. Haas*, 18 Tex. 616. And as to Virginia, see *McCandlish v. Hopkins*, 2 Leigh, 267.

⁷ *Mullanphy v. County Court*, 6 Mo. 563; *Haxall v. Lee*, 2 Leigh, 267; *Wms. Exrs.* 440, 441. Thirty days is the period allowed in some States to the widow and next of kin, before a stranger can apply. *Munsey v. Webster*, 24 N. H. 126; *Cobb v. Newcomb*, 19 Pick. 336. Six months' delay imports renunciation of priority in North Carolina. *Hill v. Alsbaugh*, 72 N. C.

The reason why a creditor has usually been selected under such circumstances, is in order that his claim may not be lost for want of administration upon the estate.¹ He is a person in interest. The amount of one's claim seems not essential, except it be for preferring the principal creditor.² But it ought to be a claim which survives by law.³ The creditor should make affidavit or be prepared to prove his claim before the probate court, as a prerequisite to obtaining the appointment.⁴ Administration may be committed to one or more creditors; but one is preferred by the court where the estate is small and easily managed.⁵ A creditor having ample security, which he could enforce without an administration at all, appears not to have been favored for the trust in the English ecclesiastical practice, lest simple contract creditors should receive detriment;⁶ and administration is regularly refused to one who buys up a debt after the death of the deceased, and so becomes a creditor.⁷ Policy, however, not principle, seems to have dictated this rule of refusal, for there are admitted exceptions;⁸ and not only has a creditor's assignee in bankruptcy been permitted to apply in his stead;⁹ but likewise a surety who, after the death of his principal, has cancelled an obligation;¹⁰ one, too, like an undertaker, whose claim accrues after the death in all strictness, and yet in connection with rendering last offices to the deceased, such as a preferred claim upon the estate may well be based upon, independently of administra-

402. For the peculiar limitation in Alabama, see *Davis v. Swearingen*, 56 Ala. 539.

¹ *Elme v. Da Costa*, 1 Phillim. 177; *Brackenbury, Goods of*, 25 W. R. 698; *Stevens v. Gaylord*, 11 Mass. 256.

² *Arnold v. Sabin*, 1 Cush. 525.

³ *Stebbins v. Palmer*, 1 Pick. 71; *Smith v. Sherman*, 4 Cush. 408. That the claim would be barred, if the statute of limitations were pleaded, is held no objection. *Caig, Ex parte*, T. U. P. Charl. (Ga.) 159; *Coombs v. Coombs*, L. R. 1 P. & D. 288.

⁴ *Wms. Exrs.* 442; *Aitkin v. Ford*, 3 Hagg. 193.

⁵ *Wms. Exrs.* 442; *Harrison v. All Persons*, 2 Phillim. 249.

⁶ *Roxburgh v. Lambert*, 2 Hagg. 557.

⁷ *Coles, Goods of*, 3 Sw. & Tr. 181; *Wms. Exrs.* 443.

⁸ *Ib.*; *Downward v. Dickinson*, 3 Sw. & Tr. 564.

⁹ *Wms. Exrs.* 443; *Schwertfegen, Goods of*, 24 W. R. 298; and see *Burdett, Goods of*, 45 L. J. 71.

¹⁰ *Williams v. Jakes*, 35 L. J. P. M. & A. 60.

tion.¹ The creditor should, of course, be a suitable and competent person for the trust, as in other cases, and he should give security to administer rateably, or otherwise comply with the statute requirements as to qualifying for the office.²

If there is no husband, widow, next of kin, or creditor, willing and competent to the trust, administration may be granted to such other person as the court deems fit. Such has long been the English practice,³ and statutes confirm or enlarge this judicial discretion both in England and the United States.⁴ Distant kindred, having no legal interest in the distribution, may thus receive letters of administration; or an entire stranger in point of blood and interest.⁵

A creditor entitled to administer may, like parties prior in right, renounce the trust, or fail to respond when cited in.⁶

§ 116. Public Administrator or other Official appointed in Certain Cases. — In English practice, administration by a public officer on behalf of absentee or non-resident parties in interest is not clearly provided for. That discretion of the court, to which we alluded in the last section, and which may be exercised in default of competent creditors and next of kin, fastens upon kindred more distantly related, the guardian or agent of an incompetent distributee, and other persons having a remote interest, if such may be had. But as to an utter stranger, or the mere appointee of the court invested

¹ *Newcombe v. Beloe*, L. R. 1 P. & D. 314.

² *Brackenbury*, Goods of, 25 W. R. 698.

³ *Wms. Exrs.* 445; *Davis v. Chanter*, 14 Sim. 212.

⁴ *Mass. Public Stats.* c. 130, § 1; *Thompson v. Huckel*, 2 Hill (S. C.) 347; *English Probate Act of 1857* (Stat. 20 & 21 Vict. c. 77, § 73); cited *Wms. Exrs.* 446, 447. "Special circumstances" are recognized, under this English act, as affording ground for departure from the rule of priority.

⁵ *Ib.*; *Keane*, Goods of, 1 Hagg. 692; *Wyckhoff*, Goods of, 3 Sw. & Tr.

20. We have already seen that in some of the United States all kindred in order, and not simply "next of kin," in distribution, may have a legal right to administer. In case of a lunatic next of kin, a stranger was appointed, with the consent of the lunatic's guardian and own next of kin. *Hastings*, Goods of, 47 L. J. P. D. A. 30. As to "special circumstances," see, further, *Clark*, Goods of, 25 W. R. 82; *Tyndall*, Goods of, 30 W. R. 231. Guardians or trustees are thus substituted. *Bond*, Goods of, L. T. 33 N. S. 71.

⁶ *Carpenter v. Jones*, 44 Md. 625.

with authority, in the total absence of kindred, it has been deemed that letters of administration should only be granted for such special purposes as collecting and preserving the effects, and doing what must be strictly beneficial to the estate.¹ The Court of Probate Act of 1857 enlarged that jurisdiction which the modern spiritual courts had so cautiously exercised, conferring upon the new tribunal the power under "special circumstances" to pass over the person or persons who might otherwise be entitled to the grant of administration, and appoint such person as the court in its discretion should think fit;² a discretion which is usually exercised in favor of more distant kindred, family connections, or the fiduciary or agent of the person beneficially entitled. In our next section this subject will be further examined.³

But the wise policy of the legislature has been, in several of the United States, to commit administration to a designated public officer wherever those survivors are wanting whose vigilance should protect distribution and the general interests of the dead person's estate. To a mere stranger the temptation in such a case would be to appropriate all to himself; debtors would of choice continue indebted; and even a creditor who administered in his partial interest might plunder the estate under pretext of asserting a legal claim. A probate court cannot readily keep vigilance over a miscellaneous throng of administrators watched by no private persons in interest, nor see that the security one has given remains good and ample. There may be urgent need of an immediate administration, notwithstanding the absence of a

¹ Wms. Exrs. 445, 446; Radnall, Goods of, 2 Add. 232; Clarkington, Goods of, 2 Sw. & Tr. 380.

² Act 20 & 21 Vict. c. 77, § 73. This authority appears to be quite strictly construed by the tribunal in question, which declines to make arbitrary use of its discretion. The section is held not to apply where there is no absence of persons entitled to administration, etc., and no insolvency — insolvency of the estate being referred to as one of the "special circumstances" alluded to by

the statute. See *Hawke v. Wedderburne*, L. R. 1 P. & D. 594, and other cases cited in Wms. Exrs. 447.

Where a creditor seeks administration in default of appearance of next of kin — as where the latter are abroad or have no known address — and they fail to appear to a citation by advertisement, he must make affidavit that service was attempted and failed, and that the next of kin have no known agent in England. *Von Desen*, Goods of, 43 L. T. 532.

³ See § 117, *post*.

known husband, widow, or kindred ; these, if wanting at first, may present themselves afterwards ; and, in final default of such priority, the State falls heir to the final balance of the estate. Hence, the modern creation of an office, known usually as that of public administrator. The public administrator, receiving letters in any and all proper cases of intestacy, collects and preserves the estate, adjusts all claims upon it, charges it with such compensation for his service as the court may approve, corresponds with the non-resident or absent husband, widow, or next of kin, should such be found out, and finally distributes the residue according to law, turning it into the State treasury when the administration is completed, unless the rightful claimant has meantime taken the trust into his own charge or established a title to the surplus as distributee. Such an officer is subject to the double scrutiny of the probate court and the State Executive ; creditors and all others in interest may always inquire into the sufficiency of his bonds ; his accounts are regularly returned and recorded under special safeguards created by law against fraud, embezzlement, and concealment ; while his general official bond, if such be furnished by him, dispenses with all necessity of finding special bondsmen for numerous petty estates, and so facilitates an economical settlement. The public administrator performs the usual functions and is subject to the usual rules which pertain to ordinary administration ; he holds, moreover, a public trust, — insignificant, perhaps, but honorable. He is, in a sense, representative and attorney of the presumed heir and distributee, namely, the State ; and, more than this, he is charged with the concerns of all private persons interested in the estate, whoever and wherever they may be, winding up the affairs of the deceased on behalf of creditors and absent kindred according to their respective rights, if any such there are. Intruder, as such an official must seem to sly pilferers, exorbitant claimants, skulking debtors, and the whole swarm of meddlesome friends and spurious relatives that gather about the corpse of him who has left property accessible, but none to represent the title, the public administrator, rightly viewed, is next

friend of all who may be legally concerned, and his authority should befit the peculiar exigencies under which the law, with sound wisdom, invokes it; requiring him to act always with energy, usually upon his sole personal responsibility, and often in the face of a bitter, if not superstitious, opposition.¹

¹ The Massachusetts statute provides that if the deceased leaves no known widow, husband, or next of kin in the State, administration shall be granted to a public administrator in preference to creditors. In each county one or more public administrators are appointed by the governor, and it is the duty of such administrator, upon the foregoing state of facts, to administer upon the estate of any person who dies intestate within his county, or dies elsewhere leaving property in such county to be administered. But administration will not be granted to the public administrator when the husband, widow, or an heir of the deceased claims in writing the right of administering, or requests the appointment of some other suitable person, if such husband, widow, heir, or other person accepts the trust and gives proper bond; and such husband, widow, heir, or other person may be appointed after letters of administration have been granted to a public administrator and before the final settlement of the estate. So may a will be proved and allowed after his letters are granted. Upon such appointment of a successor, and his qualification, the public administrator shall surrender his own letters, with an account of his doings, and his power over the estate shall cease. Mass. Pub. Stats. c. 131. What aids in distinguishing this officer as one invested with plenary powers, and not the mere appointee, in fact, of the probate court, is a further provision that as to estates under twenty dollars in value, he shall proceed summarily without procuring letters of administration at all, converting assets into cash, and accounting directly with the State treasurer for the proceeds. *Ib.* § 18.

Public administrators are appointed in other States with peculiar functions prescribed by statute; as in New York, Louisiana, Missouri, Illinois, and California; such administration being found chiefly useful at the large centres of wealth and population. The reported cases are few which relate to such officers; and this is well, for the estates which reach their hands are usually too small to bear litigation, and require a prudent management, consisting at most of a few thousand dollars, and more frequently of a few hundred or less. The public administrator's duties in New York are defined by statute; and by virtue of his office, and without a special delegation of powers by letters of appointment from the probate court, such administrator may settle small estates (as *e.g.*, where the value does not exceed \$100), and in general perform the functions of collector or special administrator before procuring a formal grant of administration. Redf. Surr. Pract. 175-180. See *Union Mutual Life Ins. Co. v. Lewis*, 97 U. S. Supr. 682. As to Alabama, see *McGuire v. Buckley*, 58 Ala. 120.

The public administrator in New York city is entitled to administer where next of kin is not in the State or is otherwise disqualified to administer. *Public Administrator v. Watts*, 1 Paige, 357. But *cf.* *Public Administrator v. Peters*, 1 Bradf. 100, preferring relatives in the statute order named. Public administrator is preferred in cases of illegitimacy. *Ferrie v. Public Administrator*, 3 Bradf. 249.

The city of New York is, under the statute, responsible for the application of all moneys received by the public administrator "according to law"; but

§ 117. **English Rule in Cases Analogous to those which call for a Public Administrator.**—Public administration is thus

not for effects unlawfully taken by him as belonging to an intestate, but, in fact, belonging to another. *Douglass v. New York*, 56 How. (N. Y.) Pr. 178. Grant of administration to a public administrator should only be upon due citation. *Proctor v. Wonmaker*, 1 Barb. Ch. 302. Expressed wish of decedent or next of kin may be disregarded in California. *Morgan's Estate*, 53 Cal. 243. Public administrator preferable, in court's discretion, to the nominee of a non-resident executor in that State. *Murphy's Estate*, Myrick (Cal.) 185. And preferred to nominee of non-resident next of kin. 57 Cal. 81. As to preferring the public administrator to kindred who are not "next of kin," the language and practice under the statutes of appointment must determine. See *Langworthy v. Baker*, 23 Ill. 484; *Supra*, § 111. And see *Hanover, Re*, 3 Redf. (N. Y.) 91. Administration granted to the attorney of a foreign administrator, however, as matter of comity, saving certain rights of a public administrator. *Hanover, Re*, 3 Redf. 91. See *c. post* as to foreign and ancillary appointments. Prior right of public administrator over attorney for disqualified next of kin. *Blank, Matter of*, 2 Redf. (N. Y.) 443. But the public administrator's right exists only in case of intestacy. *Nunan's Estate*, Myrick, 238. As to conflict with creditor, see *Doak, Estate of*, 46 Cal. 573. *Semble* that if no one else can be found for the trust, the public administrator must serve. *Callahan v. Griswold*, 9 Mo. 784; *Johnston v. Tatum*, 20 Ga. 775. In Louisiana the public administrator is postponed to the attorney-in-fact of an heir. *Henry's Succession*, 31 La. Ann. 555. And otherwise limited as to contests. *Miller, Succession of*, 27 La. Ann. 574. As to citing in a widow present in the State, see *Dietrich's v. Succession*, 32 La. Ann. 364.

The language of some local statutes requires not only that the public administrator shall yield to the claim of any one of foreign next of kin to administer, but also to any suitable nominee of such a kinsman. However this may be, the writer thinks that a non-resident next of kin should not be permitted to nominate another non-resident to the utter exclusion of the resident public administrator and resident creditors.

These points may be noted as to the official authority of a public administrator. (1) Jurisdiction may be claimed by him on the ground that the last domicile or residence of the intestate was in the county (or simply perhaps that the intestate died there), or because the intestate left property in the county to be administered, no matter where he died or resided; the facilities for administration being extended as far as possible to all such cases on a simple showing of one's death, leaving assets. But property to be administered, or some occasion for granting administration, should exist in either case. (2) This public officer is preferred to creditors, distant kindred, unauthorized strangers, and absent or non-resident next of kin, as the person on the whole most suitable for managing and settling an estate when there is no known husband, widow, or next of kin to the deceased within the State. (3) But the priority of surviving husband, widow, and next of kin claiming to administer is fully preserved, and at any time before the estate is settled, should any such, even if non-resident, appear, such a person's wishes and claim to administer or choice will be respected, and the public administrator must give way; and so, too, should a will be probated. (4) Nevertheless, the non-resident husband, widow, or next of kin of an intestate may permit the public administrator to take or continue in the trust; such officer being a

seen to apply most especially to estates which, in default of nearer known distributees, are likely to go to the State, subject to the further assertion of any such claims upon the treasury. The estate administered may, however, be that of a person leaving a non-resident spouse or kindred, or of one, resident or non-resident, whose kindred and family are unknown or appear to have died out. In English practice, when a foreigner dies intestate within the British dominions, administration appears to be granted to the person entitled to the effects of the deceased according to the law of his own country, unless a question of British domicile is raised.¹ If the intestate was domiciled abroad or out of English jurisdiction, leaving assets in England, there should be an administration taken in England as well as in the country of domicile.² Where a party entitled to administration is resident abroad, due diligence must be used to give him notice of the application, before administration will be granted to

most fit representative of non-residents interested who are poor and ignorant, if the estate will not bear great expense. (5) The public administrator, furthermore, has an interest, from his official character, to oppose the claims of all pretended kindred or spouses; and as *amicus curiæ*, and acting on behalf of the State and absentees, he should take heed, as a public officer, that no false claimant procures the estate or its surplus, and that no one administers at all without furnishing to the court an adequate bond, in order that the rights of all interested in the estate may be properly protected. And it is only when a person shown lawfully entitled to administer, or an executor who has proved a *bond fide* last will, qualifies by furnishing a sufficient bond, that the prudent vigilance of this officer should cease.

The legislation regarding public administrators, and particularly that of Massachusetts, appears to justify the foregoing statement; though judicial exposition, of course, is wanting, and

may long be. Mass. Pub. Stats. c. 131; ib. c. 130, § 1; Cleveland v. Quilty, 128 Mass. 578.

In various States the sheriff of the county or the clerk of the county courts is designated as virtual public administrator, and if no one else can be found competent or willing, may be even compelled to take the trust. Johnston v. Tatum, 20 Ga. 775; Scarce v. Page, 12 B. Mon. (Ky.) 311; Williamson v. Furbush, 31 Ark. 539; Hutcheson v. Priddy, 12 Gratt. 85. In New York the commissioners of emigration are also empowered to act in certain cases where foreigners die intestate on the passage. Commissioners, *Ex parte*, 1 Bradf. (N. Y.) 259. And, outside of the city of New York, the county treasurers may exercise functions. Ward, *Re*, 1 Redf. (N. Y.) 254.

¹ Wms. Exrs. 429, 430; 1 Add. 340; Von Desen, Goods of, 43 L. T. 532. See generally, as to foreign and ancillary administration, etc., c. *post*.

² Wms. Exrs. 430; Attorney-General v. Bouwens, 4 M. & W. 193.

another party not of his selection.¹ Stat. 24 and 25 Vict. c. 121, § 4, provides with reference to all countries which reciprocate by treaty, that when a subject of a foreign country shall die within the British dominions, leaving no person present who is rightfully entitled to administer the estate, the foreign consul may administer on procuring letters from the proper court.²

But in the case of a bastard, or of any other person dying intestate without leaving lawful kindred, husband or wife, the English sovereign is entitled to the surplus as last heir; and the English practice has been to transfer by letters patent the royal claim, with the reservation of a tenth part, whereupon the court usually grants letters of administration to the patentee as nominee of the crown. But whoever may be appointed to the trust, the right of the crown by way of distribution is not impaired.³ Under the modern statute 15 Vict. c. 3, administration similar to that of a public administrator is recognized, though within narrow bounds; for this act provides that administration of the personal estate of intestates, where the crown is entitled, may be granted to the solicitor of the treasury as the crown's nominee. Such administrator need not give bonds, but in other respects he is subject to the usual obligations and has the usual rights and duties of an administrator.⁴

§ 118. **Method and Form of granting Letters of Administration.**—The method of procuring letters of administration is quite similar to that pursued by executors in obtaining letters testamentary, but dispensing with a probate. The

¹ Wms. Exrs. 429; 3 Phillim. 637.

² Wms. Exrs. 430.

³ Wms. Exrs. 433, 434; Dyke v. Walford, 5 Moore, P. C. 434; 2 Cas. temp. Lee, 394-397. A similar course appears to have been pursued in case of forfeiture to the crown, as for treason, felony, or *felo de se*. By Stat. 33 & 34 Vict. c. 23, § 1, such forfeiture is abolished; and in this country it is not allowed.

⁴ Attorney-General v. Kohler, 9 H. L. Cas. 654; Wms. Exrs. 434, 435; Canning, Goods of, 28 W. R. 278. When money of an estate has been paid to the solicitor of the treasury in default of next of kin, and afterwards an applicant establishes his right to the money as a next of kin, he is entitled to the balance, together with accruing interest. Gosman, *Re*, 49 L. J. Ch. 590.

person claiming administration must apply by petition in writing to the probate court having jurisdiction of the case. Such petition is usually filed with the register in the first instance, whereupon a citation issues, unless the petitioner, by the written assent or renunciation of all others equal or prior in interest, can show an undoubted right to his immediate appointment; the citation, made returnable at a convenient court day, serves to notify all persons interested of the proceedings pending. At the hearing any person interested in the estate may appear and show cause for or against the appointment of the person named in the petition, who should on his part be prepared to show the facts essential to the grant of letters.¹

The English rule is that parties contesting the right to administration, before any grant, must proceed *pari passu* and propound their several interests.² But probate procedure is quite simple in most parts of the United States. The surrogate, ordinary, or judge of the probate or orphans' court, whoever exercises jurisdiction in such matters, passes upon the petition in which citation was issued, and upon such adverse petitions besides as may be drawn up later to suit the occasion; making the appointment after a summary hearing of all persons interested. There is strictly neither plaintiff nor defendant; but, of applicants, some may withdraw and others come in at any time while the case is in progress.³

¹ The petition in American States is drawn up after a regular form approved by the court, and usually contained in a printed blank. In an original petition for general administration, it is proper to set forth the fact of the death of the person who deceased intestate, the time of the death, the place of last residence, the name and residence of the spouse, if any, and the names, residences, and degree of kindred of his next of kin. If the next of kin are minors, this fact should be stated. Other grounds on which the petitioner bases his right to administer should be alleged; and local statutes will suggest what such statements should be, in the various cases of

creditor, stranger, public administrator, etc., as well as in the various kinds of administration to be considered hereafter. See Smith's Prob. Pract. 75.

As to informalities in the petition considered immaterial, see *Abel v. Love*, 17 Cal. 233; *Townsend v. Gordon*, 19 Cal. 188. A petition not showing on its face that it is made by a person interested as the statute requires should be dismissed. *Shipman v. Butterfield*, 47 Mich. 487.

² 1 Phillim. 459; Wms. Exrs. 425.

³ *Delorme v. Pease*, 19 Ga. 220. Applicant who is resisted, allowed to open and close. *Weeks v. Sego*, 9 Ga. 199. Objection to a grant, on the ground that

When a petitioner for administration withdraws his petition in the probate court, he ceases to be a party to the record.¹ If contest arises as to the essential facts, such as pedigree, the case may be adjourned from time to time; and witnesses are summoned or a commission issued to take depositions as convenience may require.² Affidavits, which in probate proceedings are much used, precede the grant of administration both in England and American States; as, for instance, an oath by the petitioner to the essential facts of death and intestacy of the deceased, to the right or relationship of the claimant, the value of the estate, or the proper service of the citation.³

As a prerequisite to the grant of administration, a satisfactory bond, in modern practice, must usually be furnished by the person selected for the trust; which bond having been approved and filed in the registry as the law directs, letters of administration issue to the person appointed, who may proceed forthwith in the execution of his trust unless an appeal is taken from the probate court.⁴ Administration should never be granted by parol, but entered as of judicial record, and preserved at the registry of probate where the

there are other kindred preferred, cannot be taken by a stranger. *Burton v. Waples*, 4 Harr. 73; 56 Ga. 146.

¹ *Miller v. Keith*, 26 Miss. 166.

² See *Ferri v. Public Administrator*, 3 Bradf. 151.

³ See *Wms. Exrs.* 454, as to the administrator's oath. And see *Torrance v. McDougald*, 12 Ga. 526; *Gillett v. Needham*, 37 Mich. 143.

⁴ Probate bonds, as well as appeals from the probate court, are considered in *cs. post.* Letters should usually be granted at the next term of the court succeeding the publication of the citation, unless the petition is regularly continued. *McGhee v. Ragan*, 9 Ga. 135.

A grant of administration is *prima facie* evidence of all precedent facts essential to jurisdiction; and the record need not affirmatively show the superior qualifications of the person appointed

over the contesting applicant. *Davis v. Swearingen*, 56 Ala. 31. As to the form of letters, see *Witsel v. Pierce*, 22 Ga. 112; *Wms. Exrs.* 452; *Smith's Prob. Pract.* (Mass.) Appendix. "Administration on the estate of A. granted to B., he giving bond," is an unconditional grant of administration, the bond being filed as of the same date. *Haskins v. Miller*, 2 Dev. L. 360; *Tucker v. Harris*, 13 Ga. 1. And see, further, *Post v. Caulk*, 3 Mo. 35; *Davis v. Stevens*, 10 La. Ann. 496; *Pleasants v. Dunkin*, 47 Tex. 343.

In cases of certain officials, such as public administrator, a general bond is given; and an order to administer will sometimes issue by way of a sufficiently valid appointment, though this mode is not usual. See *Thompson v. Bondurant*, 15 Ala. 346; *Russell v. Erwin*, 41 Ala. 292.

bond and other papers relative to the case are kept; letters duly authenticated under the seal of the court being furnished to the qualified administrator, and certificates of the appointment supplied by the register, from time to time as occasion may require.¹

§ 119. **Administrator as such must be appointed; Credentials of Authority.** — No one is *ex officio* administrator of a deceased person's estate; but the appointment must in each case be made and letters issued by the probate court, before one can lawfully assume the rights and duties of the trust. This general rule applies to a sheriff, coroner, police officer, or whoever else may come into the charge and temporary custody of the effects of a deceased person;² and, subject to statute qualifications already noted, the same holds true of public administrators.³ The proper evidence that one is an administrator is the letters of administration, or a certified copy thereof, under the seal of the court.⁴ And the possession of such letters by the person in whose favor the grant

¹ Wms. Exrs. 452. In this country, the person appointed administrator sometimes leaves his letters lying in the registry, having no occasion to exhibit them as credentials. If he has been duly appointed and qualified, however, the probate records show this, and the grant of administration doubtless takes effect without delivery of the letters from the registry.

If the law has prescribed no specific form in which the appointments of administrators are to be made, effect must be given to the act of the probate judge who signs a certificate of appointment, although it may not be expressed in the usual form and manner. *Carlson, Succession of*, 26 La. Ann. 329. As to dispensing with the judge's signature, see 85 N. C. 258. The decree of the probate court is often expressed as appointing the applicant, "he giving bond with sufficient sureties," etc. The effect of this appears to be that the signing of such decree does not *per se* complete

the appointment; but the condition must first be complied with, and the intimation is that only upon formal approval of the bond, whereupon letters under seal issue, shall the appointment take full effect. The rule is to date decree, bond, and letters all on the same day. See next c. as to qualifying by bond; also preceding note.

A grant which includes two estates under one administration is held not to be void. *Grande v. Herrera*, 15 Tex. 533. But such a grant would certainly be thought irregular and highly objectionable in probate practice.

² *Wilson v. Dibble*, 16 Fla. 782; *Williamson v. Furbush*, 31 Ark. 539.

³ *Supra*, § 117; *Hamilton, Matter of*, 34 Cal. 464; *Thomas v. Adams*, 10 Ill. 319.

⁴ *Davis v. Shuler*, 14 Fla. 438; *Albright v. Cobb*, 30 Mich. 355; *Davis v. Stevens*, 10 La. Ann. 496; *Tuck v. Boone*, 8 Gill, 187; *Moreland v. Lawrence*, 23 Minn. 84.

runs is *prima facie* proof that they were duly granted and delivered.¹

§ 120. In what Cases Administration may be dispensed with.—Subject to convenient rules of limitation as to time, such as we have already noticed, administration is always desirable for the settlement of intestate estates not trivial in amount. Nor does American policy so much dispense with the judicial formalities as it renders the judicial procedure as simple and inexpensive as possible. The custody of the law must, in this instance, be regarded as a custody for the benefit of all parties interested; and whether citizen or stranger, the estate of every person who dies capable of acquiring and transmitting property should be subjected to this process, for a due collection of effects, settlement, and distribution. In no legal sense can heir, next of kin, or creditor, be regarded as the representative of the deceased or successor in title, unless administration has been committed to him.² Nor can one portion of the kindred sue another portion in matters pertaining to an intestate's estate, without the medium of an administrator for the court to recognize.³ Creditors of the deceased intestate who have occasion to press their claims or to re-open the transactions of his life; parties in interest, too, who may wish to collect a claim or quiet a title on behalf of the estate; these all need administration as a step preliminary to invoking legal process in other courts.⁴ A person exclusively entitled to the estate must get such credentials of authority before he can sue others for what belongs to the estate.⁵ Distributees cannot obtain their distributive shares, nor ascertain what those shares should be, without such a representative; and it is against sound policy to permit an action to be sustained upon any promise to settle and pay over the distributive shares without taking out letters.⁶ Where, in fact,

¹ McNair v. Dodge, 7 Mo. 479.

² Bartlett v. Hyde, 3 Mo. 490; Alexander v. Barfield, 6 Tex. 400.

³ Davidson v. Potts, 7 Ired. Eq. 272; Miller v. Eatman, 11 Ala. 609.

⁴ See Bowdoin v. Holland, 10 Cush. 17.

⁵ Bradford v. Felder, 2 McCord (S. C.) Ch. 168; Cochran v. Thompson, 18 Tex. 652.

⁶ Marshall v. King, 24 Miss. 85; Allen v. Simons, 1 Curtis, 124; Sharp

v. Farmer, 2 Dev. & B. 122.

the next of kin and heirs-at-law have taken possession of the estate of a deceased person and held it for many years, dividing it and exercising other acts of ownership, they may nevertheless be held accountable for the whole property to an administrator regularly appointed afterwards; and a court of equity will not, at their instance, restrain him from recovering the assets in an action at law.¹

There are, however, as we have observed, statute limitations to the grant of original administration; the bounds set being, on sound principle, those usually fixed for quieting titles and checking litigation.² So there may be limitations of value, lest trifling estates be frittered away in the course of a needless settlement.³ Moreover, it is held competent for all the heirs and kindred of a deceased person, if they be of age, to settle and pay the debts of the estate, and divide the property fairly among themselves, without the intervention of an administrator; for in such a case the rights of no one

¹ *Whit v. Ray*, 4 Ired. 14; *Carter v. Greenwood*, 5 Jones Eq. 410; *Echols v. Barrett*, 6 Geo. 443; *Eisenbise v. Eisenbise*, 4 Watts, 134. And see *Weeks v. Jewett*, 45 N. H. 540; *Wilkinson v. Perrin*, 7 Monr. 217.

Rarely, if ever, can exception be asserted at this day because of incapacity in the intestate. American law recognizes neither slaves nor outlaws; but all may acquire and transmit title to personal property. As to free persons of color, see *Scranton v. Demere*, 6 Ga. 92. But as to a deceased Indian not taxed, see *Dole v. Irish*, 2 Barb. 639. An infant may die entitled to property in his own right, so that administration of the estate becomes requisite. *Miller v. Eatman*, 11 Ala. 609. Cf. *Cobb v. Brown*, Speers Eq. 564. And although the *status* of the wife at common law forbade her to acquire personal property in her own right, and the husband has been said to administer for his own benefit, if he administers at all, the modern tendency is to require administration in all cases where a married woman having a separate estate dies intestate. Schoul. Hus. & Wife, §§ 408, 409;

Holmes v. Holmes, 28 Vt. 765; *Patterson v. High*, 8 Ired. Eq. 52; *supra*, § 98.

² *Supra*, § 94. Cf. *Foster v. Commonwealth*, 35 Penn. St. 148; *Pinney v. McGregory*, 102 Mass. 89. Twenty years is the Massachusetts limit. *Ib.* After a long adverse possession of personalty, equity will presume a former administration to protect the rights of *bona fide* purchasers. *Woolfolk v. Beatly*, 18 Ga. 520.

³ Estates less than twenty dollars need not, in Maine, be administered upon. *Bean v. Bumpus*, 22 Me. 549. In Massachusetts no such general limit of value is placed; *Pinney v. McGregory*, 102 Mass. 89; but public administrators are empowered to collect and pay over to the State treasurer without taking out letters for estates so small. Pub. Stats. Mass. c. 131, § 18. In Indiana, estates worth less than \$300 are to be inventoried, appraised, and settled without an administrator. *Pace v. Oppenheim*, 12 Ind. 533. Should an estate turn out to be of the full statute value, letters ought afterwards to be procured.

are prejudiced.¹ Such settlement and division would not, however, be in strict compliance with the law, and, if made unfairly, or in disregard of the rights of some party in interest, it might be avoided afterwards through the intervention of a legal administrator.² Other instances are found where the courts disincline to appoint an administrator unnecessarily, or to permit one already appointed to overthrow the reasonable transactions of distributees with reference to the estate, for the mere sake of asserting his own lawful authority.³

Statutes specially dispense with letters of administration in various instances; and particularly where the balance of pay due some public servant is to be settled by government, or the bounties, prize-money, or pensions of soldiers and sailors remain to be adjusted. For the public interest is often thought to be best subserved in such cases by dealing directly with widows, orphans, and other next of kin, through the Executive; to the utter exclusion, if need be, of the intestate's creditors, and the avoidance of controversies in probate court over the *locus* of assets or of the decedent's last domicile.⁴

¹ Taylor v. Phillips, 30 Vt. 238; Babbitt v. Brown, 32 Vt. 437; Henderson v. Clarke, 27 Miss. 436; Needham v. Gillett, 39 Mich. 574; 29 La. Ann. 347.

² Hibbard v. Kent, 15 N. H. 516; Clarke v. Clay, 31 N. H. 393.

³ Thus, in Alabama, a court of equity may decree distribution direct, when administration, if granted, could be for no other purpose. Fretwell v. McLemore, 52 Ala. 124. And, in Pennsylvania, an administrator was not permitted to disturb a sale of personal property made before his appointment by the widow and kindred, where he could not show

debts or any good cause for re-opening the transaction. Walworth v. Abel, 52 Penn. St. 370. For an administrator can proceed both prudently and with delicacy by charging off the proceeds to the shares of widow and kindred in his accounts.

⁴ For English statutes concerning administration of the effects of intestate seamen, marines, and soldiers, see Wms. Exrs. 455-460. United States army and navy acts make frequent provisions for a peculiar distribution and settlement through the auditors of the treasury.

CHAPTER IV.

APPOINTMENT OF ADMINISTRATORS NOT ORIGINAL AND GENERAL.

§ 121. **Administration is not always Original or General.** — Since administration in our law fulfils every purpose of settling estates where no executor serves, it follows that the grant cannot always be both original and general, as considered in the preceding chapter. On the contrary, there remain several kinds of administration, all of a special and limited nature, to be stated, and all fully recognized in probate practice, English and American. These may be enumerated in order, as chiefly (1) administration with the will annexed (*cum testamento annexo*); (2) administration of personalty not already administered (*de bonis non*); (3) temporary administration, as for instance, during minority (*durante minore ætate*); (4) and special administration for limited and special purposes (*ad colligendum*, etc.). The Latin idiom admits of other names and classes; not to speak of ancillary administration, whose discussion belongs to a later chapter, as contrasted with the principal or domiciliary administration.

§ 122. **Administration with the Will annexed (*cum testamento annexo*); When granted and how.** — In various instances administration should be granted of testate estates; as where the decedent omitted in his will to name an executor, or when the executor or executors named are all found dead or incompetent to act when the will is to be presented for probate, or where the executor refuses the trust, or neglects to appear and qualify as the statute directs. Here the court must grant an administration, while giving the will its due operation as far as possible, and admitting it to probate; and this sort of grant is known as administration with the will annexed.¹

¹ See 2 Inst.; Mass. Gen. Stats. c. Vicksburg, 2 Miss. 379; Tuttle v. Turner, §§ 6, 7; Wms. Exrs. 461; Peebles v. Jones L. 403. v. Watts, 9 Dana (Ky.) 102; Vick v.

The will should, of course, be presented for probate, even though there be no executor to serve under it; and, in default of an executor, the person applying to be appointed administrator with the will annexed takes usually the burden of probate, petitioning after the same form as an executor, but alleging the special circumstances, besides, under which he claims the appointment. Letters of administration with the will annexed should not be granted unless the exigency is made apparent; executors, if alive and competent, should have full opportunity to take or renounce the trust; any renunciation on their part should be made in proper form; and if, out of several executors named, one is willing and competent to serve, such administration is not to be granted.¹ When granted upon proof of the will in common form, such administrator may be called upon, like any executor, to prove the will afterwards in solemn form; and renunciation of this trust in one's favor is not necessarily renunciation of the right to contest probate.² Pending an appeal from probate of the will, a petition for such administration cannot be allowed.³

§ 123. **Administration with the Will annexed; Functions of the Office.**—The functions of administrator with the will annexed are, in general, those of executor; for the probate court makes him pilot by substitution, to steer like an executor by the chart which the deceased has left behind. His letters are worded to fit the case; but he qualifies substantially as an administrator.⁴ A will is not vitiated by the failure of executors to carry out its provisions; and the full appointment of an administrator with the will annexed as-

¹ Wms. Exrs. 281, 283, 461; Stebbins v. Lathrop, 4 Pick. 33; Maxwell, *Re*, 3 N. J. Eq. 611; *Supra*, § 44; Springs v. Irwin, 6 Ired. L. 27. If there are several executors, all must duly renounce before administration with the will annexed can be granted. 1 Roll. Abr. 907, pl. 6. But as to Mississippi practice, when the executor named was a non-resident and did not seasonably

object to such a grant, see Cox v. Cox, 16 Miss. 292.

² Wms. Exrs. 337; 2 Cas. temp. Lee, 241.

³ Fisher, *Re*, 15 Wis. 511.

⁴ Wms. Exrs. 470; next c. By the better practice, the judicial record should show that there was cause for granting such administration. But see Peebles v. Watts, 9 Dana, 202. See also Giesen v. Bridgford, 83 N. Y. 348.

sumes, though not perhaps conclusively, that the court has, in point of fact, admitted the will to probate.¹

§ 124. **Administration with the Will annexed; to whom granted; Residuary Legatee.** — The rule, when uncontrolled by statute, is to grant administration with the will annexed to the claimant having the greatest interest under the will, for which reason the residuary legatee is preferred to mere next of kin. And statute 21 Hen. VIII. has accordingly been construed, in English courts, as admitting of such an exception to the rule of administration, forasmuch as that statute conforms, in its spirit, to the presumed last wishes of the deceased.² Of two or more residuary legatees, any of them may be taken as the court shall see fit to select.³ And though the estate be such that the residuary legatee is not likely to have a residue, or by the terms of the will must hold that residue with limitations, the presumption of the testator's favor upholds his claim, nevertheless, to be appointed.⁴ He is preferred, not only to next of kin, but to all other legatees under the will besides; and if he die after the testator, and before obtaining letters, his personal representative takes precedence in his right to the fullest extent.⁵

§ 125. **Administration with the Will annexed; Appointment of Next of Kin.** — So far, however, from having any legal right to the grant of such letters, the residuary legatee could not compel the selection of himself by mandamus; but the English spiritual court thus proceeded at its own discretion.⁶

¹ Lackland v. Stevenson, 54 Mo. 108.

² 1 Ventr. 219, *per curiam*; Wms. Exrs. 463, 464; Atkinson v. Barnard, 2 Phillim. 318.

³ Taylor v. Shore, 2 Jones, 162. See Wms. Exrs. 467.

⁴ Hutchinson v. Lambert, 3 Add. 27; Atkinson v. Barnard, 2 Phillim. 316. But where one is made a mere trustee of the residue it is otherwise. 2 Cas. temp. Lee, 243, 294, 327; Ditchfield, Goods of, L. R. 2 P. & D. 152. Where a residuary legacy is given to a trustee

to be paid over, the *cestui que trust*, not the trustee, should be appointed. Thompson's Estate, 33 Barb. 334.

⁵ Wms. Exrs. 464, 465; Jones v. Beytagh, 3 Phillim. 635; Wetdrill v. Wright, 2 Phillim. 243; 6 Notes of Cas. 44. *Aliter*, as suggested above, where the so-called residuary legatee is a mere trustee under the will. Hutchinson v. Lambert, 3 Add. 27; Ditchfield, Goods of, L. R. 2 P. & D. 152.

⁶ 2 Stra. 956; Wms. Exrs. 465.

But if the residuary legatee was also next of kin (saving the rights of husband or widow surviving) practice and statute united in his favor, and the court could not pass him over.¹ Upon the refusal or inability of the residuary legatee to fill the vacancy under the will, administration with the will annexed has been granted most commonly to the next of kin; though the English practice is to refuse such administration where the next of kin takes under the will no beneficial interest.² Administration may be granted to next of kin where the will contains no clear disposition of the residue.³

§ 126. **Administration with the Will annexed; Surviving Spouse's Right considered.**—Where a wife makes a lawful will, but appoints no executor, or names one without any right to do so, her surviving husband's right has been variously construed; but it would appear that the grant of letters is discretionary in the court according to the circumstances. One of these circumstances is the lawful interest acquired under such a will; another, whether, apart from such interest, the wife had a right to constitute any executor other than her husband.⁴ As to the wife's partial disposition rightfully made, the rule appears to be to respect her wishes, or those of the parties in interest, and to grant an administration with the will annexed accordingly, where there can be no executor; but limiting the grant thus, to decree an administration *cæterorum bonorum* to her husband.⁵ On the whole, the husband's right to administer is favored in England and the United States, save so far as the wife may have lawfully controlled it by her own testamentary disposition.⁶

What has been said of the widow's general right to administer on the estate of her deceased husband may suffice for establishing her precedence over the next of kin, or statute

¹ 2 Cas. temp. Lee, 414.

² Sw. & Tr. 135; *Salmon v. Hays*, 4

³ Wms. Exrs. 466; *Kooystra v. Hagg*, 386.

Buyskes, 3 Phillim. 531.

⁴ 2 Cas. temp. Lee, 537.

⁵ *Aston, Goods of*, L. R. 6 P. D. 203.

⁶ Wms. Exrs. 415, 416; *Schoul. Hus.*

⁷ *Dr. Lushington in Brenchley v. & Wife*, §§ 457-470, *passim*; *Supra*, *Lynn*, 2 Robert. 441; *Bailey, Goods of*, § 98.

equality with them, wherever occasion arises for granting administration with the will annexed, of such estate.¹

§ 127. **Administration with the Will annexed; Executor's Rights.**—If there be an executor living and competent, his paramount rights must be respected. And any order of court which grants administration with the will annexed to another before the executor has formally renounced the trust, is voidable upon his application made in due time.² Logically speaking, an executor ought not to be allowed to take out administration with the will annexed;³ but there are cases in which an individual may be considered entitled to such grant, after renouncing the claim of executor. Thus, it is held in Missouri that an executor, whose appointment as such was avoided by his being an attesting witness, may nevertheless be appointed administrator with the will annexed.⁴ In England, recently, a similar grant was made to a husband who was made sole executor and universal legatee under his wife's will, and who, after having renounced in the probate, desired afterwards to prove the will.⁵ And a widow appointed sole executrix has been permitted to decline that responsible trust, and afterwards serve as administratrix with the will annexed, in connection with another administrator.⁶

When an executor resides abroad, rules of non-residence apply, such as we have already considered; non-residence

¹ *Supra*, § 99. *Semble*, by English practice, that, following the intent of the will, administration "during widowhood" may be the proper limitation. Wms. Exrs. 463, n; 7 Notes of Cas. 684.

² *Baldwin v. Buford*, 4 Yerg. 16; *Thompson v. Meek*, 7 Leigh, 419. But the executor cannot formally renounce and claim his right after administration with the will annexed has been granted. Wms. Exrs. 284; Add. 273.

³ Wms. Exrs. 470, citing English rules of court, which preclude a person entitled to a grant in a superior character from taking it in an inferior.

⁴ *Murphy v. Murphy*, 24 Mo. 526.

⁵ *Blisset, Goods of*, 44 L. T. 816. Having renounced probate in his capacity of executor, his interest, nevertheless, as universal legatee, supported the grant of administration with the will annexed. See Stat. 20 & 21 Vict. c. 77, § 79, to the effect that where one renounces probate his right in respect of the executorship shall wholly cease, and administration be committed as if he had not been appointed.

⁶ *Briscoe v. Wickliffe*, 6 Dana, 157.

does not essentially disqualify, but in English practice the executor, by a power of attorney revocable at pleasure, may have another appointed administrator with the will annexed.¹

§ 128. *Administration of Personalty not already administered (de bonis non); when granted, etc.* — The general principle of administration *de bonis non* is that this grant shall be made where a vacancy must be filled by the court while the estate remains incompletely settled. Hence the grant is made under either of two aspects: (1) where there was a will, or (2) where there was no will. In the former instance letters testamentary, as we have seen, hold good so long as one of two or more executors survives to fulfil the trust, and holds his office; and where, on the other hand, there was no executor at the time of probate, the original appointment becomes that of administrator with the will annexed. In the latter instance the vacancy created is that of sole original administrator. Failing the original office, therefore, under a will, administration *de bonis non* with the will annexed is proper; but failing the original office, where there was no will, administration *de bonis non* simply. In modern practice, to render any grant *de bonis non* valid, the original office must be vacant at the time by the death, resignation, or removal of the sole executor or original administrator.²

Where the sole executor, whose functions cease, has not completed the administration of the estate, where he has not paid all the legacies, satisfied all the lawful claims, and delivered over the balance in his hands to the persons entitled thereto, an administrator *de bonis non* with the will annexed

¹ *Supra*, § 109; 1 Cas. temp. Lee, 402; Bayard, Goods of, 1 Robert. 768; Wms. Exrs. 468. Administration with will annexed may be granted to the attorney of the foreign executor in some States. *St. Jurgo v. Dunscomb*, 2 Bradf. (N. Y.) 105. Or the non-resident executor empowers a resident attorney to accept service of process, etc. Mass. Pub. Stats. c. 132.

² See *Rambo v. Wyatt*, 32 Ala. 363;

Wms. Exrs. 7th ed. 471; *Creath v. Brent*, 3 Dana, 129. Under Massachusetts statutes, administration *de bonis non* (with or without the will annexed, as the case may be) is proper whenever an unmarried woman, being sole executor or administrator, marries; the trust terminating accordingly, instead of vesting in her husband, as under the old law of coverture. *Supra*, § 32; Schoul. Hus. & Wife, §§ 163, 460.

may be rightfully appointed.¹ And the Massachusetts statute is quite explicit in declaring that when a sole executor or administrator with the will annexed dies after entering upon the duties of his trust and before it is discharged, or is removed by the court or resigns, administration *de bonis non* with the will annexed may be granted;² there being, of course, occasion for the appointment, such as unsettled debts or unadministered estate, and something remaining to be performed in execution of the will. English practice regards, by way of exception, the right of a sole executor to transmit the office to his own executor;³ but that distinction, we have seen, is not upheld in most of the United States.

So, correspondingly, is it with the administration of an intestate estate. If a sole administrator dies before completing the trust committed to him, or is removed by the court or resigns, administration *de bonis non* will be granted, provided there is personal property left unadministered or debts remaining due from the estate.⁴ As with co-executors, how-

¹ Alexander *v.* Stewart, 8 Gill & J. 226; Brattle *v.* Converse, 1 Root (Conn.) 174.

² Mass. Gen. Stats. c. 101, § 1.

³ *Supra*, § 43; Wms. Exrs. 471-473. See Grant, Goods of, 24 W. R. 929. Such a rule involves a very nice inquiry as to the necessity of administration *de bonis non* when there is an administration *durante minoritate* of an executor of an executor. Wms. Exrs. 473.

⁴ Mass. Gen. Stats. c. 101, § 1; 2 Bl. Com. 506; Scott *v.* Fox, 14 Md. 388; Hendricks *v.* Snodgrass, 1 Miss. 86; Wms. Exrs. 474. "Debt" construed not to include "legacy." Chapin *v.* Hastings, 2 Pick. 361.

Statute restrictions are imposed, however, on this grant. In Massachusetts, unadministered estate or unsettled debts, upon the lapse of sole executorship or sole administration, must be left to the amount of at least twenty dollars. Mass. Gen. Stats. c. 101, § 1. This is for the purpose evidently of checking

litigious proceedings, and dispensing with multiplied offices for trifling estates. Administration *de bonis non* is often granted with the view of overhauling the acts and conduct of some predecessor, and making him, his bondsmen, and his personal representatives answerable to dissatisfied parties in interest. If the trust has been essentially fulfilled under the original grant, it is thought better to suffer the administration to expire.

Notwithstanding statute limitations concerning original administration, it is held that administration *de bonis non* may be granted after the lapse of twenty years from the death of the former administrator. Bancroft *v.* Andrews, 6 Cush. 493; Holmes, *In re*, 33 Me. 577. But long lapse of time and other circumstances favor a presumption that the estate has been fully settled. Murphy *v.* Menard, 14 Tex. 62. And see San Roman *v.* Watson, 54 Tex. 254. But the question is not merely whether

ever, so in joint administration, the survivor becomes sole administrator, and the original office does not lapse so long as one remains to fill it.¹ The goods of an intestate do not go to the legal representative of a deceased administrator, nor has such representative any preferred right to the successorship.²

It is held that where, in consequence of the death of a qualified executor pending proceedings to test the validity of the will, there is no legal representative of an estate, the probate court may grant letters of administration *de bonis non*, even while an appeal from that cause is pending.³ But it would have been better to defer such grant, and as a general rule, there cannot be two valid grants of administration subsisting at the same time in one jurisdiction upon one estate; and wherever there is an executor or administrator still in office, with powers not limited as to objects or time, even though he ought to be removed, the appointment of an administrator *de bonis non* is a nullity.⁴ Where the county court of competent jurisdiction in a State has granted probate and letters testamentary, or administration of an estate, the same court has jurisdiction to grant administration *de bonis non*.⁵ And the American doctrine is that the administrator *de bonis non* derives his title from the deceased, and not from his predecessor in office.⁶

debts remain unpaid, but whether the estate has been wholly settled and the trust closed. Protection of the rights of distributees may give occasion for the appointment; as where the final settlement of a deceased administrator is set aside by the courts. *Scott v. Crews*, 72 Mo. 261; *Byerly v. Donlin*, 72 Mo. 270. And see *Neal v. Charlton*, 52 Md. 495.

¹ *Wms. Exrs.* 474; 2 Vern. 514.

² See *Taylor v. Brooks*, 4 Dev. & B. L. 139; *Donaldson v. Raborg*, 26 Md. 312.

³ *Finn v. Hempstead*, 24 Ark. 111.

⁴ *Creath v. Brent*, 3 Dana, 129; *Hooper v. Scarborough*, 57 Ala. 510. Under Mississippi statutes, however, peculiar provision is made for a new

grant of letters in the county to which the administrator moves or to which the property is removed. *Watkins v. Adams*, 32 Miss. 333. As to what constitutes removal from office, resignation, etc., see *c. post*.

⁵ *Lyons, Ex parte*, 2 Leigh, 761.

⁶ *Foreign Missions, In re*, 27 Conn. 344. The reduction of the assets to cash is not necessarily a full settlement of the estate, so as to dispense with administration *de bonis non*. *Donaldson v. Raborg*, 26 Md. 312. And such administration may be proper where the executor has advanced for debts and distribution from his own funds, but has not had an opportunity to reimburse himself. *Munroe v. Holmes*, 13 Allen, 109.

§ 129. *Administration de bonis non; To whom committed.* — Administration *de bonis non* is usually committed according to the rules already laid down concerning the original grant of letters. Thus, for administration *de bonis non* with the will annexed, administration with the will annexed furnishes the criterion of preference.¹ And for administration *de bonis non* on an intestate estate, the ecclesiastical rule sanctioned likewise by courts of common law, has been that there is no distinction in the choice between this and original administration.² But while these rules prevail in England, they differ in the United States.³ Thus, the New York statute provides that letters shall be granted “to the widow, next of kin, or creditors” of the deceased “in the same manner as thereinbefore directed in relation to original letters of administration,” but without prescribing the order of preference as between the classes named.⁴ But in other States, Massachusetts for instance, it is provided that where a sole executor or administrator dies before he has fully administered the estate, the next of kin of the deceased have no right to claim administration *de bonis non*, but the judge of probate may grant it to any suitable person.⁵

The grant of administration *de bonis non* regards, according to the better reasoning, the interest of the original estate, rather than of those representing the original appointee, whose management, indeed, may require a close investigation, after his death, removal, or resignation;⁶ and hence it seems

¹ Wms. Exrs. 7th ed. 472.

² Wms. Exrs. 474, 475; 2 Hagg. Appendix, 169, 170.

³ If creditors of an estate declared insolvent, fail to nominate, the court may appoint an administrator *de bonis non* at discretion. Long v. Easy, 13 Ala. 239. A female first cousin on the father's side takes precedence of a male first cousin on the mother's side under the Maryland code. Kearney v. Turner, 28 Md. 408. The widow's preference is considered in Pendleton v. Pendleton, 14 Miss. 448. The creditor for the greatest amount will be appointed administrator *de bonis non*, other things

being equal. Cutlar v. Quince, 2 Hayw. (N. C.) 60.

⁴ Bradley v. Bradley, 3 Redf. (N. Y.) 512. This statute is construed to give the residuary legatee preference as against the widow, where the sole executor dies, in like manner as if he had renounced. Ib. And see Cobb v. Beardsley, 37 Barb. 192; *Supra*, § 99.

⁵ Neither widow nor next of kin have, therefore, a right to claim administration *de bonis non* in Massachusetts. Russell v. Hoar, 3 Met. (Mass.) 187.

⁶ Under the English stat. 20 & 21 Vict. c. 77, authorizing a disregard of the usual priority under “special cir-

better still that the court should have power to appoint at discretion some third person committed to neither interest, but impartial between them, as well as energetic and prudent. So, too, in determining here the right of kindred to administer, the *status* at the death of the person who left the estate, and not the *status* at the time the trust became vacant, should be regarded ;¹ for thus does the appointment go by the beneficial interest.

§ 130. **Death of surviving Spouse pending Settlement of deceased Spouse's Estate.** — If the husband dies pending the settlement of his deceased intestate wife's estate, the interest will devolve upon his next of kin. This is the English rule, and it applies in this country wherever, certainly, the right to administer for a husband's own benefit prevails. But by the old ecclesiastical practice in England, the course of administration was irregular. If the husband died before his appointment, administration was granted to the wife's next of kin and not the husband's ; such administrator, however, being treated in equity as trustee for the husband's legatees or next of kin.² But thus to pass over those beneficially interested for strangers *pro forma*, who might be hostile, seemed so contrary to sound principle, that the husband's representatives were afterwards preferred in a case of administration *de bonis non*, and it was held that administration ought to go with the interest, whether the husband had taken out letters on his wife's estate before his own death or not.³ In fine, the more rational rule has been established, both in

cumstances," etc., joint grant of administration *de bonis non* has been made to a next of kin and a person entitled in distribution. Grundy, Goods of, L. R. 1 P. & D. 459; and see L. R. 1 P. & D. 450, 538.

If a married woman be executrix or administratrix and dies, those interested in the estate, rather than her surviving husband, should be taken for the succession. Wms. Exrs. 416. The marriage of a woman, serving in such a capacity, is by some codes made to ter-

minate the trust so that administration *de bonis non* would be proper. Mass. Gen. Stats. c. 101, § 1. And see *supra*, § 128.

¹ Wms. Exrs. 475, 476; 1 Cas. temp. Lee, 179.

² Schoul. Hus. & Wife, § 415; Wms. Exrs. 412; Squib v. Wyn, 1 P. Wms. 378; 2 Hagg. Appendix, 169.

³ Fielder v. Hanger, 3 Hagg. 769; Attorney-General v. Partington, 3 H. & C. 193; Wms. Exrs. 413, 414.

England and the United States, that administration on the wife's estate shall be granted, in case the husband's death pending its settlement, to the husband's representatives; unless indeed (as under a marriage settlement or some peculiar statute) the wife's next of kin are entitled to the beneficial interest; the grant in either case following the interest.¹

§ 131. *Administration de bonis non; Miscellaneous Points.* — Where a statute order of preference is preserved in the grant of administration *de bonis non*, the citation, which is always a proper preliminary to the grant of such letters, may be found indispensable for concluding those in priority;² otherwise, however, where the statute dispenses with such precedence and leaves the court to its own unfettered choice.³

Letters of administration *de bonis non* issue in due form as in other cases; following, however, the peculiar style appropriate to the grant; and the probate record or judicial order makes due reference to the former grant and the manner of its termination. The administrator thus appointed makes oath and qualifies after the manner of a general administrator, *mutatis mutandis*.⁴ This sort of administration is usually to be regarded as a general grant; but under exceptional circumstances it may be limited.⁵

¹ Fielder *v.* Hanger, *supra*; Hendrin *v.* Colgin, 4 Munf. 231; Whitaker *v.* Whitaker, 6 Johns. 112; Bryan *v.* Rooks, 25 Ga. 622; Harvey, *Re*, 3 Redf. (N. Y.) 214; Patterson *v.* High, 8 Ired. Eq. 52; Schoul. Hus. & Wife, § 415. See statute in New York specially providing that the husband's administrators and executors may take the property, so as to dispense with administration *de bonis non* on the wife's estate. Lockwood *v.* Stockholm, 11 Paige, 87. But *cf.* Harvey, *Re*, 3 Redf. (N. Y.) 214.

See as to a preference, likewise according to the interest, where a widow died before having fully administered her husband's estate, and collateral kindred on her side and on the husband's

side both desire letters. Cutchin *v.* Wilkinson, 1 Call (Va.) 1.

² Wms. Exrs. 477, 478; 1 Hagg. 699; 2 Hagg. 626.

³ See Sivley *v.* Summers, 57 Miss. 512. In English practice, the grant of administration *de bonis non* may be limited to a particular interest, as that of a sole creditor. Burdett, Goods of, L. J. 45, P. D. A. 71.

⁴ See Wms. Exrs. 478, 479.

⁵ In English practice it has been limited in certain instances. See Hammond, Goods of, L. R. 6 P. D. 104. So American statutes provide, too, where this administration is taken out after twenty years, as to property, etc., ascertained afterwards. Mass. Pub. Stats. c. 101.

§ 132. **Temporary Administration; Administration during Minority** (*durante minore ætate*). — Temporary administration deserves attention among the peculiar classes enumerated in the present chapter. Unlike those already described, this administration is of a limited or circumscribed character, in being confined to a particular extent of time, though the administrator has the powers of an ordinary administrator for the time being.

To this class belongs what is known as administration during minority. Administration during minority (*durante minore ætate*) may be granted where the person who was constituted sole executor under a will, or who has the right of precedence to administer an intestate estate, is under age, and therefore legally incapable of serving for the time being. In the one instance, administration during minority with the will annexed may be properly committed to another; in the other, administration simply, with the like qualification. English practice deals with this administration more fully than American;¹ but it is recognized more or less clearly in parts of the United States, where, however, the policy is to avoid such grants limited in terms as much as possible.² If there are several executors, and one of them is of full age and capacity, administration during minority need not be granted, because the person of full age may serve, notwithstanding the non-age of others.³

The usage of the English courts has been to grant admin-

¹ Wms. Exrs. 479-495; *Cope v. Cope*, L. R. 16 Ch. D. 49.

² *Pitcher v. Armat*, 6 Miss. 288; *Ellmaker's Estate*, 4 Watts, 34; *Taylor v. Barron*, 35 N. H. 484, 493, *per* Bell, J. And see Mass. Gen. Stats. c. 93, § 7, as to committing administration with the will annexed where the executor named in the will of the deceased is a minor. In North Carolina, the court may appoint an administrator *durante minority*, where the widow is under twenty-one years of age, and give the administration to her on her attaining full age, or the office may be filled by such per-

son as she shall nominate. *Wallis v. Wallis*, 1 Wins. (N. C.) 78.

³ Wms. Exrs. 479. See *Cartright's Case*, 1 Freem. 258. The Massachusetts statute provides that in such a case the other executor shall administer until the minor arrives at full age, when, upon giving bond and qualifying, the latter may be admitted as joint executor with him. Mass. Gen. Stats. c. 93, § 7. As to administration, American practice usually passes over those in minority, and selects, without any punctilious regard for their right of choice, some suitable administrator invested with general powers as in other cases.

istration during minority to the child's guardian; but this rule is not invariable; and next of kin and guardians alike may be passed by; for after all this sort of administration is a grant discretionary with the court.¹ An administrator *durante minore ætate* has the functions of an ordinary administrator so long as his authority lasts.² It was formerly held that an infant executor was capable of serving at seventeen, but the confusion of legal rights and responsibilities thereby entailed upon the administration of estates ended with the prohibition of statute 38 Geo. III. c. 87.³

Where there are several executors, all under age, and administration during minority is granted in consequence, it will cease upon any one of the executors coming of age.⁴

§ 133. **Temporary Administration; Administration *durante absentia*.**—We have elsewhere seen how executors and administrators out of the jurisdiction may substitute their nominees; and what general statute provisions are made for the case of non-residence, as by taking out letters and having a resident attorney authorized to accept service.⁵ But in English ecclesiastical practice, if probate had not been obtained, and the sole executor named in the will was out of the kingdom, a limited administration *durante absentia* might be granted, limited in time correspondingly; and so, too, where the next of kin was abroad, and letters of ordinary administration had not been granted.⁶ Similar grants are found in

¹ Wms. Exrs. 481, 482, and cases cited; 1 Hagg. 381. The English probate act, § 73, enlarges the discretion of the courts. See its application under a will making the daughter sole executor, where limited administration was granted to the trustees, but probate was refused. Stewart, Goods of, L. R. 3 P. & M. 244. And see Burchmore, Goods of, L. R. 3 P. & D. 139.

² Cope *v.* Cope, L. R. 16 Ch. D. 49. But formerly the opinion prevailed that such administrator had scarcely more than a bailiff's or servant's authority. See Wms. Exrs. 553, 554, showing how the functions were very gradually admitted by judicial precedents.

³ Section 6 of this act, reciting the inconvenience of grants to infants under the age of legal majority, enacts that "where an infant is *sole* executor, administration with the will annexed shall be granted to the guardian of such infant, or to such other person as the spiritual court shall think fit, until such infant shall have attained the full age of twenty-one years, at which period, and not before, probate of the title shall be granted to him." Wms. Exrs. 485.

⁴ 4 Burn Eccl. Law, 228; 3 Redf. Wills, 107.

⁵ *Supra*, §§ 109, 127.

⁶ Wms. Exrs. 502-512; Clare *v.* Hedges, 1 Lutw. 342; S. C. cited in 2

our earlier American practice.¹ But the more usual course in the United States at present is (subject of course to local variations in accordance with statute direction on the subject), for the court to appoint some one the general administrator of the estate, either with or without the will annexed, according as one may have died testate or intestate, treating this official as the general and responsible representative of the estate; the case admitting, perhaps, of what we term a special administration, if the emergency be pressing and likely to be temporary only; while here the rights of next of kin, as such, to dictate administration, are more lightly weighed than in England, under all circumstances.²

Lord Holt has observed that it was reasonable there should be an administrator *durante absentia*, and that this administration stood upon the same reason as an administration *durante minore ætate* of an executor, viz.: that there should be a person to manage the estate of the testator till the person appointed by him is able.³ But while both grants are of the temporary administration sort, it is not certain that they confer commensurate authority.⁴

Administration *durante absentia* was formerly available only where original letters testamentary or of administration had not issued; in other words it was for the preliminary convenience of the estate alone. When probate had once been granted, and the executor afterwards went abroad, the spiritual courts would not grant new administration.⁵ This

P. Wms. 579. This case was misreported in 4 Mod. 14, as is shown in *Slater v. May*, 2 Ld. Raym. 1071.

¹ *Willing v. Perot*, 5 Rawle, 264.

² See § 135, *post*, as to special administration. Various local statutes may be found to meet the case of non-residence or absence. Prolonged absence, detrimental to the interests of an estate, and involving negligence, might present a case perhaps for removal from office in some States. The Louisiana code in the case of an "absentee" requires a curator *ad hoc* appointed to defend certain suits. *Morris v. Bienvenu*, 30 La. Ann. 878; *Weaver v. Penn*, 27 La. Ann. 129.

Good security will be required of an absentee, who, under some local statutes, must appoint an attorney authorized to accept process, etc., on his behalf.

³ *Slater v. May*, 2 Ld. Raym. 1071.

⁴ Thus it is observed that an administrator *durante absentia* may assign the leaseholds and other property of deceased. *Webb v. Kirby*, 3 Sm. & G. 333.

⁵ In South Carolina administration *durante absentia* cannot be granted after probate of the will and letters testamentary are granted. *Griffith v. Frazier*, 8 Cranch. 9.

produced inconvenience; for, while a power of attorney might answer all ordinary purposes on the absentee's behalf, there are special cases where the demand for a personal representative within the jurisdiction is indispensable. Hence the statute 38 Geo. III. c. 87, was passed, which, in connection with still later acts, permits the grant of special administration whenever the ordinary executor or administrator goes and remains abroad out of the reach of process; the special appointee having been at first intended simply to represent the estate in proceedings in equity, though limited grants are now permitted in a much wider sense.¹ The appointment of a mere attorney may terminate by the death of the absent fiduciary who conferred it; but no such effect attends the grant of limited administration under these statutes.² The limited purpose of the grant, as for pending proceedings in court, is likewise protected by the same means. But, aside from legislation, and as concerning the appointment *durante absentia* preliminary to probate or to the grant of ordinary administration, of which the court took earlier cognizance, it is said that such administration is at an end the moment the absentee returns.³

§ 134. **Other Temporary Administrations; Administration pendente Lite, etc.**—English probate practice recognizes other temporary administrations; usually limited, however, in purpose as well as time. Administration *pendente lite* is of this description: a grant long since allowable where controversy arose touching the right of administration, and afterwards equally permitted in contests over the probate of wills and

¹ Wms. Exrs. 503–509, citing these statutes and numerous decisions. The act 38 Geo. III. c. 87 (known as Mr. Simeon's act), had only this limited application to proceedings in equity. It was passed, moreover, with reference to executors only. The Court of Probate Act, 20 & 21 Vict. c. 77, § 74 (1857), extended the operation of this statute to the case of absent administrators. And by the statute 21 & 22 Vict. c. 95, § 18, a general scope was given to these acts,

“whether it be or be not intended to institute proceedings in the court of chancery.” Limited grants are now accordingly made as the convenience of an estate may require. Ruddy, Goods of, L. R. 2 P. & D. 330; Jenkins, Goods of, 28 W. R. 431; Richardson, Goods of, 35 L. T. 767.

² Wms. Exrs. 509; Taynton v. Han-
nay, 3 B. & P. 26.

³ Rainsford v. Taynton, 7 Ves. 466;
Wms. Exrs. 509.

letters of executorship.¹ Administrators *pendente lite* are virtually appointees of the probate court, corresponding nearly to receivers in chancery, so far as the occasion for an appointment may be regarded, and they are assumed to be indifferent between the contending parties.² No one should be appointed by the court to this trust who stands committed as to the choice of one contestant against the other; nor should the decedent's estate be subjected to the cost and encumbrance of such an administration, where a rightful executor or administrator can discharge the duties of his office, whose appointment is not questioned.³ Administration *pendente lite* is recognized in parts of the United States under various qualifications, though statutes of more extensive scope are found to include this case under what is rather to be termed special administration.⁴ The powers of the English administrator *pendente lite*, though originally limited by construction, have been so far extended under the Court of Probate Act of 1857, and later acts, that he may be made receiver of real estate *pendente lite*, with power to receive rents and profits, and let and manage, and, as to personal estate, exercise all the rights and powers of a general administrator, other than the distribution of the residue: subject, nevertheless, to the immediate control and direction of the court,⁵ which may

¹ See Wms. Exrs. 496-501, and cases cited *passim*. Formerly the English spiritual court would not appoint an administrator *pendente lite* except in cases involving the right to administration. Moore, 636; 3 Keb. 54. But it was decided in 1731 that such administrator might be appointed in contests touching an executorship. Walker v. Woolaston, 2 P. Wms. 589. The Probate Court Act of 1857 gave the probate courts full jurisdiction as to controversies touching the validity of a will or for obtaining, recalling, or revoking any probate or any grant of administration. Act 20 & 21 Vict. c. 77, § 70. And see the latter act, 21 & 22 Vict. c. 95, §§ 21, 22, which gave still further scope to this appointment. Wms. Exrs. 496, 497.

² Wms. Exrs. 498-501 and cases cited.

³ Mortimer v. Paull, L. R. 2 P. & D. 85. An appointment by consent of the contesting parties obviates objections of this character. Wms. Exrs. 497.

⁴ See special administration, *post*; Lamb v. Helm, 56 Mo. 420; Crozier v. Goodwin, 1 Lea, 368; Wade v. Bridges, 24 Ark. 569. An administrator appointed by the chancery court under Tennessee code, § 2213, is not a mere administrator *pendente lite*, but a general administrator. Todd v. Wright, 12 Heisk. 442. An administrator *pendente lite* should not be appointed after the general administrator has fully settled the estate. Fisk v. Norvell, 9 Tex. 13. And see Slade v. Washburn, 3 Ired. L. 557.

⁵ Statutes 20 & 21 Vict. c. 77, §§ 70, 71; Wms. Exrs. 496, 497; Dawes, Goods of,

likewise require security and grant him a reasonable remuneration for his trouble.¹ The authority of an administrator *pendente lite* ceases with the suit.²

The old books suggest other occasions for requiring a limited administration as to time; as where the testator appoints a person to be his executor at the expiration of five years from his death, in which case administration with the will annexed for the intermediate period from probate seems proper.³ Administration limited until a will left in a distant land, or requiring long search or delay, could be found and presented for probate has been granted in various modern English cases, agreeably to the peculiar state of facts presented and the urgency of an immediate appointment.⁴ Administration, too, appears by the English rule to be well granted where a sole executor or administrator becomes insane and incapable of discharging his official functions;⁵ or perhaps out of regard to a beneficiary or person entitled ordinarily to take the office, so that a vacancy shall be filled by some one as for the use and benefit of the insane person,⁶ such grants running as during such incapacity.

§ 135. **Special Administration, for Limited and Special Purposes, etc.** — While English probate practice accords so many varieties of temporary administration, it also limits frequently the grant to specific purposes; the prime object being a temporary protection of the estate and all parties in interest. And thus administration may be granted in exigencies such as we have just considered, limited in terms to the purpose of some particular litigation.⁷ In an exceptional case (though

L. R. 2 P. & D. 147; *Tichborne v. Tichborne*, L. R. 2 P. & D. 41. An administrator *pendente lite* cannot, in South Carolina, collect the estate for the purpose of administration. *Kamener v. Hope*, 9 S. C. 253. Local statutes should be consulted on such points by the American practitioner.

¹ Stats. 20 & 21 Vict. c. 77, § 72; 21 & 22 Vict. c. 95, § 21; Wms. Exrs. 496.

² *Cole v. Wooden*, 18 N. J. L. 15.

³ Godolph, pt. 2, c. 30, § 5; Wms. Exrs. 513.

⁴ Metcalfe, Goods of, 1 Add. 343; Campbell, Goods of, 2 Hagg. 555; 2 Add. 351.

⁵ Phillips, Goods of, 2 Add. 336; 1 Salk. 36; Wms. Exrs. 518.

⁶ *Ib.*; Evelyn, *Ex parte*, 2 M. & K.

⁷ 4. As to removal or revocation for insanity, etc., see more generally c. *past*.

⁸ See *Howell v. Metcalfe*, 2 Add. 348, 351, note, which was limited to

not without strong reason), administration may be granted so as to be limited to certain specified chattels, while the general administration goes elsewhere;¹ or administration may be revived for the performance of some particular act.²

The result of all this should be to discourage any specific enumeration of limited or special administrations of various kinds, as at English law; whose real force and effect, as in the kinds *pendente lite*, and *durante absentia*, it is not easy to define. The vital elements in all such grants are two: limitation of time, and limitation of purpose; and these limitations frequently, but not always, subsist together.³ In the United States, legislation directs, as it may, the whole matter, and American policy appears to be to regard general or full administration, on the one hand, whether original or *de bonis*, and whether as to estates testate or intestate, as (together with appointing executors) the usual and normal grant of authority;³ and discouraging on the other hand limited grants under strange names upon mere judicial discretion, but rather, facilitating removals and the creation of vacancies in an emergency, to provide by way of substitute for the miscellaneous kinds of limited administration, what may be termed a special administration. This special administration is temporary by inference, because wholly superseded by the grant of general administration or letters testamentary; and it is limited in scope to the necessities of the situation. Legislation defines this scope; and special administration thus becomes a clearly understood grant, well adapted to the various exigencies likely to arise for invoking it. Its chief purpose

answering a specified suit in chancery; also 1 Hagg. 93; 2 Sw. & Tr. 614.

¹ Harris v. Milburn, 2 Hagg. 62; Somerset, Goods of, L. R. 1 P. & D. 350; Wms. Exrs. 520-528. As to administration in different countries, see c. *post*, ancillary administration.

² Where A. died intestate, without known relatives, the English court, on the ground that expense was incurred daily, and the value of the estate depreciating, granted administration *ad colligenda bona* with power to sell at

once. Schwertfegen, Goods of, 24 W. R. 298.

We have seen that administration *durante minore etate* is essentially a general or full administration while it lasts; and so in order to be efficacious, should administration during the lunacy of an executor, etc. See sections preceding.

³ Lyon, *Ex parte*, 60 Ala. 650. As between the words "special" and "general" in a grant of administration, see Jones v. Ritter, 56 Ala. 270.

is *ad colligendum*, or rather the collection and preservation of the decedent's effects; and the statute which creates the office sufficiently explains its purpose and incidents. Two general administrations cannot, we all admit, subsist at the same time; nor, as a rule, can a special and general grant. For in this latter instance the special grant necessarily precedes the general, being made to suit a temporary exigency; an exigency which may precede either the original appointment or the filling of some vacancy created by an appointee's death, removal, or resignation.¹

Special administration is well developed in the Massachusetts probate practice. When (as the statutes of that State expressly provide) by reason of a suit concerning the proof of a will, *or from any other cause*, there is delay in granting letters testamentary or of administration, the probate court may appoint a special administrator to collect and preserve the effects of the deceased. The paramount duty of this special administrator is to collect all the personal estate of the deceased, and preserve the same for the general executor or administrator, when appointed. For this purpose he may commence and maintain suits, though creditors of the estate are not to bring actions against him; and he may sell such perishable property and other goods as the judge shall order to be sold. In suitable cases the judge may authorize him to take charge of the real estate, collect rents, and do all that may be needful for the preservation of the property.² Such an administration may readily be shaped by the legislature to meet the usual exigencies of a temporary appointment for limited purposes; thereby dispensing with the cumbrous classification of administration *pendente lite*, *durante absentia*, and so on.

In various States express provision is made for this special or temporary administrator, who shall collect and preserve the estate for the permanent and general appointee. A disinterested person, not a litigant, is to be selected; nor are the

¹ Mass. Pub. Stats. c. 130, §§ 10-17. a will would be null. Slade v. Washburn, 3 Ired. L. 557.
Letters of general administration issued during the pendency of a contest over

² Mass. Pub. Stats. c. 130, §§ 10-17.

rights of widow and next of kin, or legatees, so strictly regarded in the choice as they would be in a general administration; but rather the sound discretion of the court, aided by the common consent and confidence of litigants and all who may be interested in the permanent appointment, directs the selection. Furthermore, it is the general rule that this officer may be removed or superseded in his functions by the court, and that his powers shall cease whenever general letters testamentary or of administration are granted, whether general letters be original or *de bonis non*; but that meantime, being an officer of the court, as it were, litigant parties cannot obstruct the exercise of his functions nor hinder him by frivolous appeals from the judge. For a trust must not be kept in abeyance which the law intends should be filled at once.¹

This special administration appointment is preliminary to a general one, according to the usual American practice, lasts for an emergency undefined as to time, and cannot be granted while a general appointee holds office, nor so that the special appointee shall fulfil all the functions of general executor or administrator. There are States, however, whose code clearly extends this appointment to the temporary necessities of minority, *durante minore ætate*; ² though it should be observed that here the exigency lasts for a definite or definable tem-

¹ A "special collector" is thus recognized in New York practice wherever, by reason of contest or other cause, there is likely to be delay in the general grant. *Mootrie v. Hunt*, 4 Bradf. (N.Y.) 173; *Lawrence v. Parsons*, 27 How. (N. Y.) Pr. 26; *Crandall v. Shaw*, 2 Redf. (N. Y.) 100. If a will is contested, the executor named ought not, when objected to, to receive the special appointment. *Howard v. Dougherty*, 3 Redf. (N. Y.) 535. That a widow or next of kin has no preference in the choice of special or "temporary" administrator, see *Lamb v. Helm*, 56 Mo. 420. The administrator *ad colligendum* is the mere agent or officer of the court, and may be compelled at any time to give way to an administrator-in-chief.

Flora v. Mennice, 12 Ala. 836. After a removal from office, the special administrator may be appointed. *De Flechier*, Succession of, 1 La. Ann. 20. Pending the appeal of an executrix or administratrix upon the question of bonds, etc., the probate court may appoint a special administrator. *Searle v. Court of Probate*, 7 R. I. 270. And see *Thompson v. Tracy*, 60 N. Y. 174.

Contest over an administration with will annexed is to be included among the exigencies calling for a special appointment. *Lamb v. Helm*, 56 Mo. 420. And see State codes as to such local legislation.

² Wagn. (Mo.) stat. 72, § 13, referred to in *Lamb v. Helm*, 56 Mo. 420.

porary period, like a guardianship, and that the appointment, to be efficacious at all, ought frequently to confer full general functions, as we have seen the English appointment does.¹ As for the departure of a general executor or administrator for foreign parts, after his appointment, to remain long absent, or his subsequent incapacity, by reason of insanity, to the plain detriment of the interests of the unsettled estate, American practice seems to prefer to the vague and limited grants of administration, usual in English practice, that a vacancy shall be made in the office, and that vacancy filled in the usual way;² unless the appointment of attorney to accept service obviates all objections.³

Every special administrator, or temporary appointee *pendente lite*, should, when his authority ceases, pay over what he may have received, and transmit the estate to the general appointee, or do otherwise with it, as the probate court shall direct; render a proper account of his doings and retaining a proper compensation for his services; whereupon his responsibility comes to an end, if his duties have been faithfully performed.⁴

¹ *Supra*, § 133. Except as the statute may have provided, a probate court has no power to direct a special administrator or "collector" to pay debts, legacies, or distributive shares. *Haskett, Re*, 3 Redf. (N. Y.) 165. Nor should such administrator, nor an administrator *pendente lite*, do such acts. *Kaminer v. Hope*, 9 S. C. 253; *Ellmaker's Estate*, 4 Watts, 34.

² Upon a general application for administration, a special grant may, in this State, be made. *Dean v. Biggers*, 27 Ga. 73. In Tennessee, where the English system appears to be more closely followed than in most other States, it is held that a special administration may be granted, with powers to

be exercised in a limited manner, or upon a part of the estate merely, or for the performance of a single act. *McNairy v. Bell*, 6 Yerg. 302; *Smith v. Pistole*, 10 Humph. 205; *Jordan v. Polk*, 1 Sneed, 430.

As to appointing a special administrator under the Iowa code, see *Pickering v. Weiting*, 47 Iowa, 242.

³ See Mass. Pub. Stats. c. 132, §§ 8-13, whose provisions fit the case of an executor or administrator removing or residing out of the State after his appointment.

⁴ See *Ellmaker's Estate*, 4 Watts, 36. As to the special administrator's compensation see *Duncan*, 3 Redf. (N. Y.) 153.

CHAPTER V.

THE BONDS OF EXECUTORS AND ADMINISTRATORS.

§ 136. **Necessity of Qualifying before Appointment; Security required by the Court.** — In modern probate practice, as we understand it in the United States, an executor or administrator is required to qualify by giving bonds before letters conferring the appointment can issue to him. This bond is expressed in such sum as the probate court may see fit to order; its form is established by the court after the statute requirements; it is made payable to the judge or his successors in office; its conditions recite the essential duties of the trust reposed in the appointee; and, filed in the probate registry, it serves as legal security furnished by the executor or administrator for the benefit of all persons who may be interested in the estate, and in case of maladministration may be sued upon accordingly. Sometimes sureties are required on these bonds; and sometimes sureties are dispensed with.

This subject we now examine in detail, with separate reference to the bonds of executors and of administrators; observing throughout this chapter the distinctions which obtain in English and American practice.

§ 137. **Bonds; When and How required from an Executor.** — In English practice, the spiritual court exerted, from early times, so little authority over an executor, whose credentials were thought to be derived rather from his testator's selection than the ordinary, that bonds could not be required from such fiduciaries. But chancery stretched its arms for the better protection of widows and orphans while the ordinary was thus powerless, and it became a rule that an insolvent or bankrupt executor could not only be restrained by the appointment of a receiver, but compelled in chancery,

like any other trustee, to furnish security before entering actively upon his trust.¹

The American rule, both as to the appointment and qualification of executors, is far more consonant to justice and impartial, and brings administrators and executors more nearly under one system of rules. The qualification of executors is not left to the interposition of equity, but is confided in the first instance by legislation to the discretion of the court most competent to exercise it; so that the probate court now passes upon the bond in connection with the appointment, withholding letters testamentary unless the executor complies with the judge's prudent requirement. Local statute prescribes the form and manner of giving this bond, as well as indicating the extent of security. Thus, in certain States, the executor, before letters testamentary issue to him, must give bond with condition to return his inventory to the probate court within the time fixed by statute; to administer, according to law and the will of the testator, all the personal estate and the proceeds of all real estate sold for the payment of debts and legacies; and to render upon oath a just and true account of his administration within one year and at any other time when required by the court.² If a person appointed executor refuses or neglects unreasonably to give the statute bond as required, letters testamentary will be granted to the other executors if there be any such capable and willing; otherwise, administration with the will annexed. In other words, qualification by bond is a prerequisite to receiving letters testamentary; the executor derives his office only under a testamentary appointment which has afterwards been confirmed by a decree of the probate court and the grant of letters; nor is one entitled to exercise any power as executor until he has been duly qualified. Such is the rule of most American States, as prescribed by the legislature.³

¹ Wms. Exrs. 7th ed. 237; Holt, 310;
1 Eq. Cas. Abr. 238, pl. 21; 2 Vern.
249; Slanning v. Style, 3 P. Wms. 336.

² Smith Prob. Pract. (Mass.) 60-64;
Mass. Gen. Stats. c. 93.

³ Gardner v. Gantt, 19 Ala. 666;
Echols v. Barrett, 6 Ga. 443; Hall v.
Cushing, 9 Pick. 395; Fairfax v. Fair-
fax, 7 Gratt. 36; Holbrook v. Bentley,
32 Conn. 502; Webb v. Dietrich, 7

As to furnishing a bond with surety or sureties, however, the executor is still favored above administrators in American practice. Our rule appears to be that the executor shall give bond "with sufficient surety or sureties."¹ But executors are exempted from furnishing a surety or sureties (as such statutes frequently direct) when the testator has ordered or requested such exemption, or when all the persons interested in the estate certify their consent, or, upon being cited in, offer no objection. Even thus, the judge is still to regard the interests of the estate, according to the preferable practice, and may, at or after the granting of letters testamentary, require a bond with sufficient surety or sureties, if he thinks this desirable because of some change in the situation or circumstances of the executor or for other sufficient cause.² Nor is even the testator's request for such an exemption to be taken otherwise than as the expression of his confidence in the person he himself designated; and hence, if that person renounces or is found incapable, the request cannot operate for the benefit of others appointed by the court to administer.³ In some States the court cannot dispense with security even should the will direct otherwise.⁴

Watts & S. 401; *Pettingill v. Pettingill*, 60 Me. 411; *Bankhead v. Hubbard*, 14 Ark. 298. One named as executor in a will has no authority to act without qualifying after probate, and the qualification of another person. *Moore v. Ridgeway*, 1 B. Mon. 234. And where a testator appointed two persons as executors of his will, only one of whom qualifies, that one has all the authority under the will which both would have had if both had qualified. *Bodley v. McKinney*, 17 Miss. 339; *Phillips v. Stewart*, 59 Mo. 491.

¹ Mass. Gen. Stats. c. 93, § 1; *Wms. Exrs.* 529, n. by Perkins.

² See Mass. Gen. Stats. c. 129; *Smith v. Phillips*, 54 Ala. 8; *Clark v. Niles*, 42 Miss. 460; *Atwell v. Helm*, 7 Bush, 504. In Massachusetts only persons of full age and legal capacity need certify their assent; as to creditors and the

guardian of any minor interested therein, a published citation after the usual form, incorporating notice of the request to be exempted from furnishing sureties with that of the pending probate and application for letters testamentary, will suffice. *Wells v. Child*, 12 Allen, 330. In some States upon a creditor's objection, sureties may be required of the executor. *Smith v. Phillips*, 54 Ala. 8. If there are infants concerned, the court must look carefully to their interests. *Johns v. Johns*, 23 Ga. 31. Executors pecuniarily irresponsible required to give security notwithstanding the testator's request, knowing such irresponsibility. *Freeman v. Kellogg*, 4 Redf. (N. Y.) 218.

³ *Fairfax v. Fairfax*, 7 Gratt. 36; *Langley v. Harris*, 23 Tex. 564.

⁴ *Bankhead v. Hubbard*, 14 Ark. 298.

But in others, once more, the testator's request appears to be more of a criterion in this regard than the rule of common prudence would allow.¹

A few States, conforming more nearly to English procedure, appear to treat executors differently from administrators, requiring bonds from one of the former class only when his circumstances are precarious or the interests of the estate render such security necessary. In each State, however, the legislature prescribes the course to be pursued and furnishes a rule for judicial action, by no means constant and uniform.² But the bond, however given, and whether with or without sureties, contemplates commonly a due administration of the estate to the full extent of paying all debts and legacies, distributing the residue properly, and rendering an inventory and accounts to the court.³

§ 138. **Bonds required from an Executor; Residuary Legatee's Bond.**—Statutes are found to dispense with the usual bond when the executor is residuary legatee, and it appears that so extensive a security is not needful for the protection of any person interested in the estate. In such a case the executor may, at his option, give a bond with condition merely to pay all debts, and legacies, and the statute allowances to widow and minors.⁴ The advantage of such a bond is in saving him the

¹ *Wilson v. Whitefield*, 38 Ga. 269; *Bowman v. Wootton*, 8 B. Mon. 67.

² *Mandeville v. Mandeville*, 8 Paige, 475. As to the bond required in New York from an executor, see *Senior v. Ackerman*, 2 Redf. (N. Y.) 156; *Redfield's Surr. Courts*, 145; *Freeman v. Kellogg*, 4 Redf. 218; *Shields v. Shields*, 60 Barb. 56. An executor about to leave the State should give security. *Wood v. Wood*, 4 Paige, 299. And as to the husband of an executrix who misconducts himself, see *Powel v. Thompson*, 4 Desau. 162.

In Louisiana an executor should be required on the expiration of his year to give security, or in default thereof dismissed and a dative executor appointed. *Peale v. White*, 7 La. Ann.

449. A testamentary executor domiciled out of the State is not entitled to letters without giving security as is required from dative testamentary executors. *Davis, Succession of*, 12 La. Ann. 399; *Bobb, Succession of*, 27 La. Ann. 344.

The South Carolina Act of 1839 contemplates a bond to be given by an executor for purchases made by him at his own sale of his testator's property. *State v. Baskin*, 1 Strobb. 35.

³ See *Cunningham v. Souza*, 1 Redf. Sur. 462.

⁴ *Mass. Gen. Stats. c. 93*; *Duvall v. Snowden*, 7 Gill & J. 430; *Morgan v. Dodge*, 44 N. H. 255. "As many persons have been ruined by giving bonds in this form, we think it the duty of

labor and expense of an inventory, reducing the penal sum to the minimum of satisfying these claimants and reserving all evidence of assets to himself; and the law thus indulges the residuary legatee, inasmuch as it is no concern of others what may be the bulk of the fortune he acquires, provided their demands are satisfied. But the disadvantage is that such a bond conclusively admits assets sufficient for the payment of all debts, legacies, and allowances in full, binding the executor and his sureties absolutely in the penal sum, to pay accordingly, even though the estate should prove insolvent; and hence an executor who does not feel certain when he qualifies that the assets are ample for all such demands, should qualify in common form, so as to limit his liability by the inventory, as returned to the court, and the actual assets.¹

§ 139. **Bonds required from an Administrator; English Rule.** — The practice of taking bonds from administrators, as distinguished from executors, must have prevailed in the English spiritual courts long before the first English colony was planted in America. For the statute 21 Hen. VIII. c. 5, § 3, directs the ordinary to take surety on granting administration.² Before the transfer of this spiritual jurisdiction to the new courts of probate in England, statute 22 & 23 Car. II.

judges of probate always to discourage this kind of security, and to take special care that no such bond is received in any case where it is not beyond doubt that the estate is solvent." *Per curiam* in *Morgan v. Dodge*, *ib.* And see *Wms. Exrs.* 543; 2 *Stra.* 1137.

¹ *Stebbins v. Smith*, 4 *Pick.* 97; *Colwell v. Alger*, 5 *Gray*, 67; *Duvall v. Snowden*, 7 *Gill & J.* 430. Where the bond to pay legacies, etc., is given, and one sues to recover a legacy, the plaintiff need give no proof except this bond that the executor has assets sufficient in his hands. *Jones v. Richardson*, 5 *Met.* 247. Nor can such a bond be cancelled or surrendered by the executor and the bond in common form substituted, long after it was time, in the ordinary course, to file an inventory. *Alger v. Colwell*,

2 *Gray*, 404. The giving of bond to pay debts and legacies does not, as a rule, discharge the lien on the testator's real estate for payment of debts, as the Massachusetts statute provides. *Mass. Gen. Stats.* c. 93, § 4. See *Cleaves v. Dockway*, 67 *Me.* 118, as to the effect of a bond given, of this character, but not in proper conformity to the statute.

A bond given by an executrix who takes a life interest in the personal property administered upon is no continuing security to those entitled in remainder for their interest in the property; but on due settlement of the estate and final account in the probate court, with distribution, the condition of the bond is satisfied. *Sarle v. Court of Probate*, 7 *R. I.* 270.

² *Wms. Exrs.* 7th Eng. ed. 529.

c. 10, served from 1671, and for nearly two centuries, to fully detail what should be the form and condition of this administration bond; the ordinary being directed to take "sufficient bonds with two or more able sureties, respect being had to the value of the estate, in the name of the ordinary." The condition herein imposed upon the administrator was, to return a true inventory to the court at or before a specified date; to administer the estate well and truly; to make a true and just account of his administration; to deliver and pay the residue as the judge should appoint; and to render up the letters in court, should a will afterwards be presented.¹ Under the new court of probate act, 20 & 21 Vict. c. 77, every person to whom administration is granted must give bond to the probate judge, in a penal sum double the amount under which the estate and effects shall be sworn; but a wider judicial discretion is allowed than under the former statute, so that the penal sum may be reduced, and the responsibility of sureties divided; moreover, the requirement of a surety or sureties, as well as the general form and condition of the bond, are matters likewise confided to this court.²

The English court of probate act, it is perceived, does not insist upon sureties in an administration; and there are instances in which the court has accordingly dispensed with

¹ Wms. Exrs. 529, 530, citing the language of this act.

² Act 20 & 21 Vict. c. 77, §§ 80-82; Wms. Exrs. 531-533. The form of administration bond required by the present rules of the English probate court may be seen in Wms. Exrs. 532. The bond is expressed after the usual form of bonds, beginning "Know all men by these presents," etc.; expressing the date; stating first the penal sum to be paid and then the condition, and being signed and sealed at the end. A. B., C. D., and E. F. (the administrator and his sureties) bind themselves jointly and severally unto G. H., the judge of the court of probate, in the penal sum named, to be paid to the said G. H., or to the judge of the said court, for the time being; "for which pay-

ment well and truly to be made, we bind ourselves and of us for the whole, our heirs, executors, and administrators firmly by these presents. Sealed with our seals. Dated the day of , A.D., 18 ." The condition then follows, preceding the execution; this condition being in substance for the most part like that prescribed in statute 22 & 23 Car. II. c. 10, *supra*, but worded differently, and varying in some material respects. As usual in bonds, this portion begins, "The condition of this obligation is such that if the above-named A. B. (reciting A. B. as administrator on the estate of I. J. in addition) do" according to the condition next stated in detail, "then this obligation to be void and of none effect, or else to remain in full force and virtue."

them; though only by way of exception to the rule, and at all events so as to insist still upon a bond.¹ Where the administrator is out of England, the sureties must usually be resident; a rule relaxed latterly, however.² If the husband of a married woman refuses to execute the administration bond with her, the court will allow administration to her and permit the bond to be executed by a third person;³ and in other instances a third person may intervene and furnish security.⁴ Under a grant of limited administration, a bond is sometimes taken in a penal sum merely nominal.⁵

Letters of administration will not issue to a creditor except on condition of his entering into a bond to administer rateably;⁶ and as to a stranger appointed, the court will require special security, according to circumstances.⁷ Where there has been an administration *pendente lite*, and the minor on coming of age takes upon himself the trust, he must give security as would the administrator in the first instance.⁸ In cases of administration not within the statute 21 Hen. VIII., or where the deceased died testate, a bond conditioned for the due payment of debts and legacies;⁹ and under statute 20 & 21 Vict. c. 77, rules of court provide for framing peculiar bonds appropriate to the grant *pendente lite*, and other limited or special administrations; two sureties being here required, as elsewhere, in double the amount of property to be admin-

¹ *Cleverly v. Gladdish*, 2 Sw. & Tr. 335; *Powis, Goods of*, 34 L. J., P. M. & A. 55. The court allows a bond with one surety under some circumstances. *Bellamy, Goods of*, L. T. 33 N. S. 71.

² *Cf. O'Byrne, Goods of*, 1 Hagg. 316; *Hernandez, Goods of*, L. R. 4 P. D. 229; *Houston, Goods of*, L. R. 1 P. & D. 85; with *Reed, Goods of*, 3 Sw. & Tr. 439; *Wms. Exrs.* 544. The reason of this change is that common-law practice now permits of a substituted service in the case of non-residents. As to the justification of securities to the administration bond, this is at the court's discretion, but with qualifications stated in *Wms. Exrs.* 545. A husband residing abroad, and administering on his deceased wife's estate, has been re-

quired at the instance of creditors to give resident security. *Noel, Goods of*, 4 Hagg. 207.

³ *Sutherland, Goods of*, 31 L. J., P. M. & A. 126.

⁴ See *Ross, Goods of*, L. R. 2 P. D. 274, where the bond was thus increased while the administrator had gone abroad.

⁵ *Bowlby, Goods of*, 45 L. J., P. D. A. 100.

⁶ *Brackenbury, Goods of*, 25 W. R. 698; *Wms. Exrs.* 443.

⁷ Act 20 & 21 Vict. c. 77, § 73; *Wms. Exrs.* 446, 447.

⁸ *Wms. Exrs.* 545; *Abbott v. Abbott*, 2 Phillim. 578.

⁹ 2 Stra. 1137.

istered upon. The registrar inquires into the responsibility of the sureties offered by an administrator, and attests the bond in token of its sufficiency.¹

§ 140. **Bonds required from an Administrator; American Practice.**— American practice in respect of probate bonds is based upon English requirements under the earlier statutes cited in the preceding section; and while, in all or most States, the form of bond is carefully prescribed, as seems quite appropriate to our statute tribunals, which a legislature invests with probate jurisdiction, Stat. 22 & 23 Car. II. c. 10, appears to have supplied the model. Thus, in Massachusetts, the bond of an original administrator, or of an administrator with the will annexed, binds him to return an inventory within the time designated by law; to administer according to law all the personal estate and the proceeds of all real estate sold for the payment of debts; to render regular accounts of his administration; to pay any balance remaining in his hands upon the settlement of his accounts to such persons as the court shall direct, and to deliver his letters of administration into the probate court in case any will of the deceased is hereafter proved and allowed.² For administrators with the will annexed, and likewise administrators *de bonis non* with the will annexed, a similar form is prescribed, but with appropriate allusions added to the payment of "legacies."³ A special administrator's bond is conditioned to return an inventory within the specified time; to account on oath whenever required for all the personal property of the deceased that shall be received by him in such capacity; and to deliver the same to whoever shall be appointed executor or administrator of the deceased, or to such other person as shall be lawfully entitled to receive the same.⁴

¹ Wms. Exrs. 548, citing rules of English probate court.

² Mass. Gen. Stats. c. 94.

³ *Ib.* See *Casoni v. Jerome*, 58 N. Y. 315. The bond of such administrators must conform to the peculiar conditions of a will, otherwise legatees may lose their rights to sue upon it. *Small v.*

Commonwealth, 8 Penn. St. 101; *Frazier v. Frazier*, 2 Leigh, 642. But *cf.* *Judge of Probate v. Claggett*, 36 N. H. 381.

⁴ *Ib.* § 7. Administrators *pendente lite* usually give bonds, and the legal validity of such bonds is beyond doubt. *Re Colvin*, 3 Md. Ch. 278; *Bloomfield v.*

Here, as in other States, local statutes relative to administration will be found to suggest the varying forms appropriate to different kinds of administration, even though no precise form be specified; and probate tribunals should see that all probate bonds conform to law, and are correctly expressed. Bonds limited in expression are not favored in the United States, any more than limited grants of administration. But as administrators do not *ex officio* dispose of real estate, it is sometimes provided that an administrator may be exempted from giving bonds for the proceeds of such property, except where authorized to make such sales.¹ The public administrator has the option in some States either to furnish a separate bond for every estate which he may be called upon to administer, or a general bond for the faithful administration of all estates on which administration is granted to him; and in either case with conditions expressed appropriate to his peculiar functions.²

§ 141. **Probate Bonds; How Taken.**—Administration bonds, as American codes usually provide, must be given by the administrator, with at least two sufficient sureties, in such penal sum as the court shall direct; double the estimated value of the estate to be administered serving as the usual basis for fixing the amount.³ In this and various other respects, the

Ash, 4 N. J. L. 314. Notwithstanding the exemption of executors favored in New York, whoever administers with will annexed must give bond, whether legatee, next of kin, widow, or creditor. Brown, *Ex parte*, 2 Bradf. (N. Y.) 22. As to construing statute provisions respecting the several conditions of an administrator's bond, see Lanier v. Irvine, 21 Minn. 447; Hartzell v. Commonwealth, 42 Penn. St. 453; Ordinary v. Smith, 14 N. J. L. 479. As to the condition to surrender the letters in case a will shall be proved, etc., see Hunt v. Hamilton, 9 Dana, 90. A condition to "administer the estate according to law" has been construed to include administration according to a will already

admitted to probate. Judge of Probate v. Claggett, 36 N. H. 381. But see § *post*.

¹ Mass. Gen. Stats. c. 94, § 6; Hughlett v. Hughlett, 5 Hump. 453. And see Salyer v. State, 5 Ind. 202.

² Mass. Gen. Stats. c. 95, § 7. See Buckley v. McGuire, 58 Ala. 226; State v. Purdy, 67 Mo. 89. In Alabama the official bond of the sheriff becomes an administration bond, when the administration of an estate is committed to him *ex officio*, and he and his sureties are rendered liable accordingly. Payne v. Thompson, 48 Ala. 535.

³ See local codes; Clarke v. Chapin, 7 Allen (Mass.) 425; Tappan v. Tappan, 4 Fost. (N. H.) 400; Bradley v.

same holds generally true of executors' bonds. A discretion as broad as that conferred on the new probate court of England by Parliament is not usually exercised by the probate courts in this country as to administration bonds. The register or clerk in some States attends to the qualification by bond; more commonly, however, the judge, as to the main particulars of security, his approval being written at the foot of the bond in token that the administrator has fully qualified, and the letters being meanwhile withheld by the register.¹ The bond of an administrator or executor runs in some States to the State; in others, to the judge of probate and his successors, as in the statute 22 Car. II. c. 10.² If one who has applied to administer does not qualify with sureties within a reasonable time, it is the duty of the court to appoint another;³ and the office of administrator is not filled until the bond is given.⁴ But where the administrator fully qualifies, giving bond according to law, the decree of the court may be considered his sufficient appointment whether he receives his formal letters or not; for the letters issue as of the same date, and if not actually delivered, are to be deemed ready for delivery.⁵

A probate bond which divides up the penal sum among the sureties is not void; but this form of bond appears to be regarded with disfavor by American courts in the absence of

Commonwealth, 31 Penn. St. 522; *Atkinson v. Christian*, 3 Gratt. 448; *Kidd's Estate*, Myrick (Cal.) 239. And see, as to Louisiana rule, *Soldini v. Hyams*, 15 La. Ann. 551; *Feray's Succession*, 31 La. Ann. 727. There are circumstances (as in ancillary administration for some particular purpose) where a small penal sum is appropriate. *Piquet, Re*, 5 Pick. 65. The security required should be for no more property than that on which administration is granted in the State. *Normand v. Grogard*, 17 N. J. Eq. 425. See as to taking a bond without sureties, *Jones v. Gordon*, 2 Jones Eq. 352.

In some States the court or register is liable in damages if he neglects to take

a bond according as the statute directs. *McRae v. David*, 5 Rich. (S. C.) Eq. 475; Penn. Act, March 15, 1832, § 27.

¹ Mass. Gen. Stats. c. 101; *Austin v. Austin*, 50 Me. 74; *supra*, § 118. Approval in writing is not an essential in all States. *Jones v. Dixon*, 21 Mo. 538.

² *Johnson v. Fuquay*, 1 Dana, 514; *Vanhook v. Barnett*, 4 Dev. L. 268. In Missouri the approval of the court is not indispensable to the validity of an administration bond. *State v. Farmer*, 54 Mo. 539.

³ *Crozier v. Goodwin*, 1 Lea, 125.

⁴ *Feltz v. Clark*, 4 Humph. 79; *O'Neal v. Tisdale*, 12 Tex. 40.

⁵ *State v. Price*, 21 Mo. 434.

legislation which expressly sanctions it, like the English act now in force.¹

§ 142. Probate Bonds; Irregularities, etc. attending Execution, How far Available.— Courts disincline to treat a probate bond as void, to the detriment of an estate, by reason of informalities and omissions attending its execution, provided a regular execution was obviously intended² by principal and sureties. Thus, inserting the name of the intestate in a blank, where that of the administrator should be, has been treated as a mistake apparent on the face of the instrument; and omissions of this sort are sometimes supplied in the blank by construing the decree of appointment and the bond together.³ Even where the principal and his sureties executed a blank bond, the qualification thereon and appointment are held good until revocation of the letters;⁴ and though the executor's or administrator's bond were accepted without sureties or upon ill compliance with the statute, the appointment itself may be valid, as made *de facto* and voidable only.⁵ An administration bond is not void because its

¹ Act 20 & 21 Vict. c. 77, cited *supra*. Hence, an executor's bond, approved by the judge, in which the sureties are each bound in half the sum for which the principal is bound, is held in Massachusetts not void for that cause, but binding on the obligors and sufficient to give effect to the executor's acts. *Baldwin v. Standish*, 7 Cush. 207. But the court further intimated that, had appeal been made from the decree of the judge of probate approving the bond in that form, such a departure from the usual course of proceeding would not have been sanctioned. *Ib.* With the increasing wealth of this country, and the growing value of estates brought necessarily into the probate court for settlement, it seems to this writer desirable that bonds of this character should be authorized, as they now so frequently are in the case of public officials. One should not be asked to risk utter ruin for the sake of a friend.

² *Moore v. Chapman*, 2 Stew. (Ala.) 466. See also *Luster v. Middlecoff*, 8 Gratt. 54.

³ *State v. Price*, 15 Mo. 375. But judgment at law upon a blank bond is refused. *Cowling v. Justices*, 6 Rand, 349.

⁴ *Spencer v. Cahoon*, 4 Dev. L. 225. For sureties to execute for a blank amount imports an authority to the principal, to whose care they confide the bond, to fill in such a penal sum as the court may require. Such a practice, however, is exceedingly careless, and no probate court should sanction it. Leaving the date of the bond blank, however, in order that the principal may fill it up according to the date of probate decree, is quite common; nor does this course appear objectionable.

⁵ *Jones v. Gordon*, 2 Jones (N. C.) Eq. 352; *Mumford v. Hall*, 25 Minn. 347; *Herriman v. Janney*, 31 La. Ann. 276; *Maxwell, Re*, 37 Ala. 362.

condition varies from that required by statute, when it was voluntarily given, and is not made void by statute, and prescribes no more than the law requires;¹ though the omission of suitable conditions therein may rule out remedies for a corresponding breach, especially as against the sureties.² Obligors on a probate bond who have executed it and suffered the bond to go upon record, may, on general principles, be estopped from afterwards denying its validity or availing themselves of irregularities, or setting up their private arrangements as to the manner in which the bond should be filled out and used, to the injury of innocent interested parties who were led to rely upon the security.³

But alterations after execution, and irregularities to which the bondsmen themselves were not privy, but rather they to whom the security was given, and which the bondsmen cannot be said to have adopted by open acts or inexcusable silence, may release them from responsibility. And in such connection a judge or register is greatly to be blamed who changes in material respects or mutilates the bond submitted to him, without the knowledge of all the parties executing it;⁴ or who, without assent of the sureties, directs that the

¹ *Ordinary v. Cooley*, 30 N. J. L. 179.

² See *Small v. Commonwealth*, 8 Penn. St. 101; *Frazier v. Frazier*, 2 Leigh, 642; *Roberts v. Calvin*, 3 Gratt. 358; *Rose v. Winn*, 51 Tex. 545; *Burnett v. Nesmith*, 62 Ala. 261.

³ *Franklin v. Depriest*, 13 Gratt. 257; *Cohea v. State*, 34 Miss. 179; *Field v. Van Cott*, 5 Daly (N. Y.) 308; *Wolff v. Schaeffer*, 74 Mo. 154. One who signs the probate bond may retract, if others intended do not sign, or the principal fails to make good his promises, but he must do so before the bond is returned and the court and innocent parties have placed reliance upon it. 4 La. Ann. 545; 10 La. Ann. 612. Not even a surety's allegation that he signed on condition that another surety should be procured, and that the judge of probate was so informed, can avail him, where there is no evidence that the bond was

delivered as an escrow. *Wolff v. Schaeffer*, 74 Mo. 154. But *qu.* whether, in States where two sureties to a probate bond are requisite, the surety may not presume that the judge will not accept the bond unless another surety executes. It is plain, however, that one who executes as surety a probate bond, without ascertaining in what manner blanks are filled, or what other signatures added before the bond becomes approved and filed, trusts his principal, in many instances, farther than prudence warrants.

⁴ In *Howe v. Peabody*, 2 Gray, 556, a probate bond executed by a principal and two sureties was altered by the judge of probate so as to increase the penal sum. After this alteration, which was made with the knowledge of the principal but not of the sureties, the same bond was executed by two ad-

bond one gives as special administrator of an estate shall stand over for his bond as general administrator.¹ It follows that a bond may, under peculiar circumstances, bind the principal but not the sureties;² also that the judge in whose name the bond runs should regard himself as obligee in the interest and for the protection of all parties interested in the estate, and sanction nothing, out of complaisance to his appointee, to impair the security required in their behalf.

§ 143. **Whether a Probate Bond may bind, as a Common-law Bond.**—It has been ruled that, though the appointment of an administrator be void for want of jurisdiction, inasmuch as the intestate neither resided nor left assets within the county at the time of death, a bond given by the administrator, while deriving no validity from the statute, may be good, nevertheless, at common law.³ And the fact, that one who was improperly appointed acts under the letters granted to him, is held to render him and his sureties liable on their bond to the parties interested in the estate, on general principle.⁴

§ 144. **Sufficiency of Probate Bonds, as to the Security and the Parties offered.**—It is not of itself a sufficient objection to sureties offered, that they do not reside in the county where letters are applied for.⁵ Non-residents, moreover, may, in some parts of the United States, be taken as sureties, the court exercising its own discretion as to their sufficiency;⁶ though the codes elsewhere expressly require that the indispensable sureties shall be inhabitants of the State;⁷ and the question, whether local practice of the common-

ditional sureties, who did not know the circumstances of the alteration, and was then approved by the judge. It was held that the bond was binding upon the principal, but not upon any of the sureties. *Howe v. Peabody*, 2 Gray, 556.

¹ *Fisher, Re*, 15 Wis. 511.

² *Howe v. Peabody*, 2 Gray, 556.

³ *McChord v. Fisher*, 13 B. Mon. 193.

⁴ *Shalter's Appeal*, 43 Penn. St. 83; *Cleaves v. Dockray*, 67 Me. 118. An

administrator's bond, though not approved by the probate court, may be good as a voluntary bond. *State v. Creusbauer*, 68 Mo. 254.

⁵ *Barksdale v. Cobb*, 16 Ga. 13.

⁶ *Jones v. Jones*, 12 Rich. L. 623.

⁷ Mass. Gen. Stats. c. 101, § 12.

There may be a third person, an inhabitant of another State, if two sureties are resident. *Clarke v. Chapin*, 7 Allen, 425.

law courts permits of a substituted service or not, in the case of non-residence, may be thought material in this connection.¹ There are local statutes which prohibit certain parties—attorneys, and counsel, for instance—from being sureties on administration bonds: a provision, however, held merely directory, and so as not to vitiate a bond, approved by the court, upon which one of the prohibited class is placed, nor to justify a party so executing in pleading exemption.² Sureties are usually permitted to prove their sufficiency under their own oath, as in the qualifying of bail; and it then devolves upon the opponent to show the insufficiency by cross-examination or evidence produced *aliunde*.³

In American practice, sureties, to save themselves trouble, frequently execute a probate bond in anticipation of the executor's or administrator's appointment; their principal holding the instrument until ready to qualify. Such a bond should be drawn up with an ample penal sum, and the principal should come prepared to establish its sufficiency to the satisfaction of the court; and care should be taken, moreover, that no material change is made in the bond without reference anew to all the sureties.⁴

§ 145. **Co-Executors and Co-Administrators; Joint and Separate Bonds.**—On a joint probate bond, co-executors or co-administrators become, as a rule, jointly liable as sureties for the acts and defaults of one another;⁵ and jointly as principals, moreover, to indemnify the surety who has been subjected to liability for the default of one of them during the continuance of the joint office.⁶ And though one or more of the co-executors or co-administrators should die, it is to be presumed that the bond remains a security for the performance of duty by the other, unless proper steps are taken to

¹ See *Wms. Exrs.* 544; *Hernandez, Goods of*, L. R. 4 P. D. 229.

² *Hicks v. Chouteau*, 12 Mo. 341; *Wright v. Schmidt*, 47 Iowa, 233.

³ *Ross v. Mims*, 15 Miss. 121.

⁴ A person who writes to the probate judge that he will become surety if A. B.

is appointed, is not so liable unless he executes the bond. *New Orleans Canal*

Co. v. Grayson, 4 La. Ann. 511.

⁵ *Litterdale v. Robinson*, 2 Brock. 159; *Brazer v. Clark*, 5 Pick. 96;

Moore v. State, 49 Ind. 558.

⁶ *Dobyns v. McGovern*, 15 Mo. 662.

have the bond made inoperative for future defaults.¹ But as to the sureties in a joint administration bond, it is held that they are not liable to one administrator for the defaults of the other.²

The real tenor of a bond must, however, determine greatly its legal effect, on the usual theory of principal and surety, though not without reference to the law in pursuance of which it was made. In Massachusetts and some other States, the statute authorizes the court, in case joint executors or administrators are appointed, to take either a separate bond with sureties from each, or a joint bond with sureties from all.³

§ 146. **Probate Bond; What Property is covered; What Functions included, etc.** — The liability of a surety on an executor's or administrator's bond is limited to the assets which rightfully come, or ought to have come, to the principal's hands in the State or country in which he was appointed and qualified.⁴ This will be better understood, when, in the course of the present treatise, the subject of administration assets is hereafter discussed. The proceeds of such assets, arising out of sales, conversions, change of investment, and transfers in general, also profit and interest, are properly thus included.⁵ So, too, effects left in the executor's or administrator's hands, and property which has come to his possession or knowledge and remains unaccounted for;⁶ and this even though he received the property before his appointment; since the liability extends to assets received before as well as after the execution of the bond.⁷ If an executor or administrator is able to pay a debt due by him personally to the estate, his sureties will be liable with him, unless he discharges it.⁸ Ordinarily, as

¹ *Stephens v. Taylor*, 62 Ala. 269; *Dobyns v. McGovern*, 15 Mo. 662. But *cf.* *Brazer v. Clark*, 5 Pick. 96; *Commonwealth v. Taylor*, 4 Phil. (Pa.) 270.

² *Hacell v. Blanchard*, 4 Desau. 21. See *Elliott v. Mayfield*, 4 Ala. 417.

³ Mass. Gen. Stats. c. 101, § 14.

⁴ *Fletcher v. Weir*, 7 Dana, 345; *Governor v. Williams*, 3 Ired. L. 152.

⁵ *Watson v. Whitten*, 3 Rich. (S. C.) 224; *Verret v. Belanger*, 6 La. Ann. 109.

⁶ *Boulware v. Hendricks*, 23 Tex. 667.

⁷ *Gottsberger v. Taylor*, 19 N. Y. 150; *Goode v. Buford*, 14 La. Ann. 102; *Choate v. Arrington*, 116 Mass. 552.

⁸ *Piper's Estate*, 15 Penn. 533. Money set down in the inventory as part of the estate must in some way be accounted for. *Goode v. Buford*, 14 La. Ann. 102; *Wattles v. Hyde*, 9 Conn. 10.

will be seen hereafter, administration does not extend to the real estate of the deceased; and hence rents received after the death of an intestate may not be thus included, nor the proceeds of lands sold,¹ for which last an administrator usually procures a license and gives a special bond. But statutes regulate this whole subject, and ultimately, according to the modern tendency, an administrator or executor may incur an official responsibility for rents and profits or for the proceeds of real estate, so as to involve the sureties on his general bond for his default.² Where the fiduciary sells land without authority, derived under a will or judicial permission, the title is not changed, and, if legal, he is liable at law for the proceeds.³

Probate bonds in these days are usually so worded as to embrace all the general functions which the executor or administrator may be required to perform in pursuance of his trust; both towards the court, and with respect of the creditors, legatees, distributees, and all others interested.⁴ So, too, may a general administration bond be held to cover all the duties of an administrator, as well in the sale of land, where occasion arises for the court's license, as in the settlement of the personalty.⁵ But if an administration bond contain no clause securing the interest of distributees, the sureties, as some States hold, will not be liable for failure or refusal to distribute.⁶ The sureties are not usually liable for

¹ *Cornish v. Wilson*, 6 Gill, 299; *Hartz's Appeal*, 2 Grant (Pa.) 83; *Commonwealth v. Higert*, 55 Penn. St. 236; *Hutchenson v. Pigg*, 8 Gratt. 220; *Reno v. Tyson*, 24 Ind. 56; *Oldham v. Collins*, 2 J. J. Marsh. 49; *Brown v. Brown*, 2 Harr. (Del.) 51.

² *Phillips v. Rogers*, 12 Met. (Mass.) 405; *Wade v. Graham*, 4 Ohio, 126; *Stong v. Wilkson*, 14 Mo. 116; *Judge of Probate v. Heydock*, 8 N. H. 491.

³ *Sherwood v. Hill*, 25 Miss. 391.

⁴ *Woodfin v. McNealy*, 9 Fla. 256; *People v. Miller*, 2 Ill. 83; *Hazen v. Darling*, 2 N. J. Eq. 133.

⁵ *Clarke v. West*, 5 Ala. 117. See *Worgang v. Clipp*, 21 Ind. 119.

⁶ *Arnold v. Babbitt*, 5 J. J. Marsh. 665. The condition "to well and truly administer according to law" has relation to the interest of creditors and not of distributees. *Barbour v. Robertson*, 1 Litt. 93. And correspondingly as to "legatees," in a bond taken for administration under a will, see *Small v. Commonwealth*, 8 Penn. St. 101; *Frazier v. Frazier*, 2 Leigh, 642. But *cf.* *Peoples v. Peoples*, 4 Dev. & B. L. 9; *Judge of Probate v. Claggett*, 36 N. H. 381. "Due administration of the estate" includes the payment of the balance to the persons entitled. *Cunningham v. Sorza*, 1 Redf. (N. Y.) 462. And see *Sanford v. Gilman*, 44 Conn. 461. Stat-

the acts of an executor or administrator in meddling with property to which he has or acquires no official right ;¹ nor are they with respect to property held or acts done by him in some other distinct capacity.²

Sureties on a probate bond, it is held, are liable for defaults of the principal occurring after their own death, especially if they expressly bind in terms their own executors and administrators.³

§ 147. **Release or Discharge of Sureties.**—American statutes frequently provide that the surety to a probate bond may, upon his petition, be discharged from all further responsibility, if the court deems it reasonable or proper, after due notice to all persons interested ;⁴ whereupon other security will be required of the executor or administrator.⁵ The principal's failure to perform duties as the bond prescribes is good ground for presenting such petition.⁶

Release of the sureties or the bond, must, however, be a judicial act regularly performed. And where an executor's

utes are differently construed. It was the English rule of construction, under the statute 22 & 23 Car. II. c. 10, that the condition to "well and truly administer according to law" did not include the neglect or refusal to distribute; though it would be a breach that the administrator had converted the assets to his own use. *Wms. Exrs.* 540, 541. A condition prescribed by New York statutes requires the fiduciary to "obey all orders of the surrogate touching the administration of the estate." This claim is construed in *Scofield v. Churchill*, 72 N. Y. 565.

¹ *McCampbell v. Gilbert*, 6 J. J. Marsh. 592. And see *Douglass v. New York*, 56 How. (N. Y.) Pr. 178.

² *Barker v. Stanford*, 53 Cal. 451; *Sims v. Lively*, 14 B. Mon. 433; *Reeves v. Steele*, 2 Head, 647. As to the same person being guardian or trustee and administrator, see *post*; *Schoul. Dom. Rel.* 3d ed. § 324. Where an executor is named trustee under the will, he is chargeable as executor on his bond as

such until he has given bond as trustee, and charged himself with the property as trustee, administration being the prior duty. *Prior v. Talbot*, 10 Cush. 1.

³ *Mundorff v. Wangler*, 44 N. Y. Super. 495.

⁴ *Mass. Gen. Stats. c. 101, § 16*; *Lewis v. Watson*, 3 Redf. (N. Y.) 43; *Valcourt v. Sessions*, 30 Ark. 515; *Johnson v. Fuquay*, 1 Dana, 514; *Norris v. Fristoe*, 3 La. Ann. 646; *McKay v. McDonald*, 8 Rich. 331; *Harrison v. Tarbeville*, 2 Humph. 242; *Jones v. Ritter*, 56 Ala. 270. As to citation in such a case, see *Stevens v. Stevens*, 3 Redf. (N. Y.) 507; 27 La. Ann. 344. The statute discretion of the court to discharge a surety from liability (unlike that of requiring new and additional security) appears to be strictly construed. *Jones v. Ritter*, 56 Ala. 270; *Wood v. Williams*, 61 Mo. 63; *People v. Curry*, 59 Ill. 35.

⁵ *Ib.*

⁶ *Sanders v. Edwards*, 29 La. Ann. 696.

or administrator's bond has been delivered into probate custody and duly accepted, the subsequent erasure of their names found upon the bond will not release their sureties.¹

§ 148. **New or Additional Bonds; when and how required.**—A new bond will be required of an executor or administrator, not only (as local acts often provide) when a former surety is discharged upon his request, leaving the probate security inadequate, but in general wherever it appears that the sureties are insufficient, or the penal sum under existing circumstances. The court, in conformity with statute, may at any time, on the petition of any person interested in the estate, require of the representative a new bond with a surety or sureties, and in such penal sum as shall appear just.² And a decree requiring an additional bond is held to be within the jurisdiction of the court of probate, even though no petition to that effect was first presented.³ Sureties, themselves, according to the practice of certain States, may, instead of petitioning to be discharged, ask for what is termed counter-security.⁴ If the principal fails to give the new or additional bond within such reasonable time as the court may have ordered, he will be removed, and some other person who can qualify appointed in his stead.⁵ It is quite desirable that the discretion of the probate court in requiring bonds should extend to all changes of circumstances as to the representative himself, the sureties, or the amount of the estate.

Whenever a new bond has been required of the executor or administrator, by way of substitution, the sureties in the

¹ *Brown v. Weatherby*, 71 Mo. 152.

² Mass. Gen. Stats. c. 101, § 15; *Loring v. Bacon*, 3 Cush. 465. As where it is shown that the aggregate property of the sureties is not equal to that of the personal estate in the hands of the administrator. *Renfro v. White*, 23 Ark. 195. Or that one or more of the sureties has died. *State v. Stroop*, 22 Ark. 328.

³ *Ward v. State*, 40 Miss. 108; *Governor v. Gowan*, 3 Ired. L. 342. Statutes may well confer authority upon the

court to require new or additional security at the court's own instance.

⁴ *Caldwell v. Hedges*, 2 J. J. Marsh. 485; *Brown v. Murdock*, 16 Md. 521; *Russell v. McDougall*, 11 Miss. 234.

⁵ Mass. Gen. Stats. c. 101, § 17; *National Bank v. Stanton*, 116 Mass. 435. An order requiring the administrator to give a new bond affects his right to administer, and his appeal therefrom without a bond does not suspend the order. *Bills v. Scott*, 49 Tex. 430.

prior bond are usually treated as liable for all breaches of condition committed by him before the new bond is executed and accepted by the court;¹ but as exempt from liability for his defaults committed afterwards.² Where, however, a new or additional bond is given by the executor or administrator for the performance of his trust, the second bond relates back, so that the sureties on the new and original bonds shall all be regarded as parties to a common undertaking. To distributees and other parties protected thereby, they became responsible to the extent of, and as among themselves, in proportion to the penalties of their respective bonds;³ and they will all share the benefit of counter-securities given to one or more of them, unless it was originally agreed that such securities should operate for some exclusive benefit.⁴ Co-sureties may stand liable together towards the court and those for whose benefit the obligation was taken, but as among themselves unequally responsible. Where it is not clear that the new bond was properly taken by the court in lieu of the former one, and so intended, the legal effect must be to furnish additional securities for the performance of the principal's duties under his original obligation.⁵

¹ Mass. Gen. Stats. c. 101, § 18; *McMeekin v. Huson*, 3 Strobb. 327. It is held that in case of release and substitution the second set of sureties become principally liable to the extent of their bond; and then if they prove insufficient, the first set to the date of their release. *Morris v. Morris*, 9 Heisk. 814.

² *State v. Stroop*, 22 Ark. 328; *Lingle v. Cook*, 32 Gratt. 262; *Russell v. McDougall*, 11 Miss. 234; *State v. Fields*, 53 Mo. 474; *Perry v. Campbell*, 10 W. Va. 228. As to the presumption on lapse of time that a default occurred after the substitution, see *Phillips v. Brazeal*, 14 Ala. 746. For as to the liability of sureties in the second or substituted bond, the gravamen of the breach may be, not a prior misapplication, but the failure to pay over. *Pink-*

staff v. People, 59 Ill. 148; *Morris v. Morris*, 9 Heisk. 814.

³ *Loring v. Bacon*, 3 Cush. 465; *Enicks v. Powell*, 2 Strobb. Eq. 196. Thus is it held as to a cause of action arising between the giving of the two bonds. *Lingle v. Cook*, 32 Gratt. 262.

⁴ *Enicks v. Powell*, 2 Strobb. Eq. 196; *Wood v. Williams*, 61 Mo. 63; *Wolff v. Schaeffer*, 74 Mo. 154.

⁵ *Wood v. Williams*, 61 Mo. 63; *People v. Curry*, 59 Ill. 35.

A new bond given by a public administrator held cumulative, and not to discharge the old sureties. 10 Mo. App. 95. The remedies for breach of an executor's or administrator's bond will be discussed hereafter. And see general works on bonds, and the relation of principal and surety.

§ 149. **Lost and Missing Probate Bonds.**— Since probate bonds are usually copied into the probate records, in American practice, the record may serve as secondary evidence for all needful purposes where the original bond is missing from the files. Local acts provide, in some instances, for a substitution, by judicial decree, where the official bond together with the record thereof has been lost or destroyed.¹

¹ See *Tanner v. Mills*, 50 Ala. 356.

CHAPTER VI.

REVOCATION OF LETTERS; NEW APPOINTMENT, ETC.

§ 150. **Appeal from Decree of Probate Court; Mandamus, etc.**
 — Appeal from the decree of the county or district probate court is regulated, in England and the United States, by local statutes, varying from time to time, which need not be examined here at length. While the spiritual jurisdiction obtained, as to probate and administration, in the mother country, appeal lay, through the ecclesiastical hierarchs, to what was known as the court of delegates, but afterwards, instead, to the judicial committee of the privy council.¹ Since that jurisdiction has become temporal in its nature, however, under the Court of Probate Act of 1857,² the right of final appeal from a decree of the court of probate has been transferred to the House of Lords.³

In most American States the supreme judicial court of common law is also the supreme court of probate and equity, and hence, a ready appeal is taken from the county probate court, by any one aggrieved by its decree. Indeed, in certain matters pertaining to the estates of deceased persons, especially where the probate of a will involving some considerable property is contested, the decree of the surrogate or county judge of probate appears often procured *pro forma* only, the full trial being had on appeal, where a jury may better be empanelled, and the case finally determined upon the law evidence before a more august tribunal, as seems befitting to the gravity of the controversy.⁴

To such higher tribunal, therefore, intermediate or final,

¹ Wms. Exrs. 571, 572, citing stats.
 24 Hen. VIII. c. 12; 25 Hen. VIII. c.
 19; 3 & 4 Wm. IV. c. 92.

² 20 & 21 Vict. c. 77.

³ Wms. Exrs. 574.

⁴ *Supra*, § 11. This right to appeal, being a statutory right, can only be secured by a strict compliance with the statute conditions. *Dennison v. Talmage*, 29 Ohio St. 433.

any person aggrieved by the order, sentence, decree, or denial of the court or judge taking primary jurisdiction of the case, may appeal. This appeal has sole reference, however, to the order or decree in question, as, for instance, in admitting such a will to probate and issuing such letters testamentary, or in granting such letters of administration; though interlocutory orders may thus be considered as well as the final decree complained of. The appeal, in fact, gives the appellate court no jurisdiction to proceed further in the settlement of the estate; but its judgment on appeal being upon such decree, order, sentence, or denial of the court below, it is certified to that tribunal, where further proceedings are had accordingly, or stopped, as if it had made no decision. The judgment of the appellate tribunal is to be carried into effect by the probate court, whose jurisdiction over the cause and the parties is not taken away by the appeal.¹

Mandamus from the superior temporal courts was a remedy formerly invoked against courts spiritual in English practice; as, for instance, to compel probate of a will or a particular grant of administration, or in case of an improper appointment or repeal.² But by modern practice, in the United States at least, since the whole jurisdiction vests in the temporal courts, appeal has become the regular mode of procedure before a higher tribunal, wherever the grievance was based upon a decree of the probate court;³ though mandamus or prohibition might still lie if the probate judge refused to entertain a proper petition or to decide at all upon the case, or if he obstructed an appeal from his decision.⁴

¹ Metcalf, J., in *Dunham v. Dunham*, 16 Gray, 577; *Curtiss v. Beardsley*, 15 Conn. 523. Where, upon reversing on appeal the decree of the surrogate admitting a will to probate, the case is sent back for a re-trial of a question of fact, the powers of executors continue until a final determination of such issue and a revocation by the surrogate of the probate. *Thompson v. Tracy*, 60 N. Y. 174.

² *Wms. Exrs.* 235, 387, 435, and cases cited; 2 Sid. 114; 1 Stra. 552. In case of an undue grant of administration, which had not already passed the seals, a prohibition issued instead. 1 Freem. 372; *Wms. Exrs.* 585.

³ *State v. Mitchell*, 3 Brev. (S. C.) 520.

⁴ *State v. Castleberry*, 23 Ala. 85; *Gresham v. Pyron*, 17 Geo. 263; *Williams v. Saunders*, 5 Coldw. 60.

§ 151. **Appeal from Decree of Probate; Subject continued.**—The right to appeal depends upon the relation of the appellant to the subject-matter of the probate decree or order. A person is aggrieved, within the meaning of our practice acts, when his rights are concluded or in some way affected by such decree or order; nor is it essential that he was directly connected with the proceedings below. A legatee or distributee, a surety on the bond, another administrator, a guardian or a trustee, a creditor, any and all of them may, under various circumstances, exercise the right to appeal from the probate of a will or the issue of letters to a particular appointee.¹ Appeal, according to the practice of some States, as fully detailed by the local statute, should be claimed in writing, and notice given at the probate office, together with the reasons of appeal, within a specified brief time (such as thirty days) after the decree complained of; copy being served meanwhile on the appointee and adverse party. The appeal should be entered at the next convenient rule day of the supreme court (or in about sixty days). The supreme court may exercise a further discretion in revising the matter, within a much longer period (such as one or two years), where the petitioner was abroad at the time of the decree, or where the omission to seasonably claim and prosecute an appeal was otherwise excusable. After an appeal is claimed and notice given at the probate registry, all proceedings in pursuance of the order or decree appealed from will cease until the determination of the supreme court is had; but if the appellant in writing waives his appeal before entry of the same, proceedings may be had in the probate court, and the appointment or probate may stand as if no appeal had been taken. Where, however, an appellant fails to enter and prosecute his appeal, the

¹ See *Livermore v. Bemis*, 2 Allen, 578. The designated executor, vested with discretion, may appeal from a refusal of probate, notwithstanding the opposition of the beneficiaries who have made a private settlement. *Cheever v. Judge*, 45 Mich. 6.
394; *Northampton v. Smith*, 11 Met. 390. Where an appeal fails merely because the appellant cannot prove that he is a party entitled to appeal, the probate decree stands as if not appealed from. *Cleveland v. Quilty*, 128 Mass.

supreme court may, at the instance of any person interested, affirm the former sentence, or make such other order as law and justice require. On appeal, issues of fact, such as the due execution of a will, may be tried by a jury.¹ Appeal to a higher tribunal to reverse the sentence by which letters or a probate had been granted offers thus a ready means of revocation, where the grant or the probate was improper.²

A supreme court of equity has sometimes taken jurisdiction to set aside letters of administration or a probate fraudulently procured.³

§ 152. **Revocation by Proceedings in the Probate Court.**—The probate court has always exercised a plenary jurisdiction in revoking or vacating its own decrees improperly rendered; thereby correcting errors such as arise out of fraud or mistake, cancelling letters which had been issued without jurisdiction, revoking an appointment granted to the wrong party, and admitting a subsequent will or codicil notwithstanding the improper probate of an earlier one. Such jurisdiction is available after the time of appealing from the decree is past. "This power," observes Gray, J., "does not make the decree of a court of probate less conclusive in any other court, or in any way impair the probate jurisdiction, but renders that jurisdiction more complete and effectual, and by enabling a court of probate to correct mistakes and supply defects in its own decrees, better entitles them to be deemed conclusive

¹ Mass. Gen. Stats. c. 117; *Peters v. Public Administrator*, 1 Bradf. (N. Y.) 200; *supra*, Part I.; *Thompson v. Tracy*, 60 N. Y. 174; *Worthington v. Gittings*, 56 Md. 542. The practitioner should consult the local statute and procedure of his own State on this general subject. English rules of court, regulating appeals from probate court, may be compared in *Wms. Exrs.* 574. The discretion of the judge below, notwithstanding a claim of appeal, appears by these rules to be more favorably considered. *Ib.*

² From the nature and necessities of the case, however, it is usually provided

that in case of an appeal from a decree appointing a special administrator he shall proceed in the execution of his duties until the supreme court directs otherwise. Mass. Gen. Stats. c. 94.

³ Thus, in Georgia, a court of equity has entertained jurisdiction to set aside letters of administration procured on fraudulent representation of intestacy, and to compel the wrongful administrator and his sureties to account with the lawful executor. *Wallace v. Walker*, 37 Ga. 265. But see *Cooper v. Cooper*, 5 N. J. Eq. 1.

upon other courts. There is no reason to apprehend that such a power may be unjustly exercised. It is vested in the same court which is intrusted with the original jurisdiction over all probates and instruments."¹ Moreover, proceedings for such revocation or change in the probate decree are conducted upon the same principle as the original petition; notice issues as before to all parties in interest, and the executor or administrator is cited before the judge, to show cause why the original probate or administration should not be revoked and his letters surrendered accordingly. And from the decree thus rendered, an aggrieved party may take an appeal, as in other instances.²

Due course of procedure before the probate court requires that the court shall revoke the old probate or administration before or simultaneously with granting a new one. This has usually been the practice in the English ecclesiastical courts;³ though numerous authorities, English and American, have maintained that if administration was committed to the wrong party and then to the right, the latter grant repealed the former without any formal decree of revocation.⁴ For which is to be styled the wrong party and which the right, we may ask, unless the probate record shows in some way that, as between the two grants, such an issue was joined? And if not joined, by such a showing, and passed upon, the readier presumption is that the court made the latter grant imprudently, unmindful that the former was outstanding. In all cases, however, where the first administration is revoked,

¹ *Waters v. Stickney*, 12 Allen, 15, and cases cited.

² *Ib.* And see *Wms. Exrs.* 571; *Curtis v. Williams*, 33 Ala. 570; 8 Blackf. 203; *Thompson v. Hucket*, 2 Hill (S. C.) 347; *Wilson v. Hoes*, 3 Humph. 142; *State v. Johnson*, 7 Blackf. 529; *Cleveland v. Quilty*, 128 Mass. 578; *Scott v. Crews*, 72 Mo. 261; *Munroe v. People*, 102 Ill. 406; *Harrison v. Clark*, 87 N. Y. 572.

³ *Wms. Exrs.* 574, 575; *Cro. Eliz.* 315; *Toller*, 126; *White v. Brown*, 7 T. B. Monr. 446. The fact that the party

first appointed disappears and cannot be served with a citation should not fatally obstruct the revocation of an improper grant and the issue of new letters to the rightful person. *Langley, Goods of*, 2 Robert. 407.

⁴ *Wms. Exrs.* 574; *Owen*, 50. Where letters were granted in the wrong county, by reason of a last residence of decedent in another county of the same State, the court of rightful jurisdiction should require a revocation of the former letters before granting letters. *Coltart v. Allen*, 40 Ala. 155.

the second stands good, though granted after the grant of the first and before the repeal of it.¹

§ 153. **Grounds upon which Revocation is Proper.** — Among the grounds upon which revocation is proper, may be stated the following: That the letters testamentary or of administration were issued without jurisdiction, inasmuch as the party was still living, or his last residence and *situs* of property conferred the whole jurisdiction elsewhere.² That the will was probated through fraud or error, or that some later will or codicil should be admitted.³ That general administration was granted, whereas the deceased died testate.⁴ That administration with will annexed was granted regardless of the executor's rights.⁵ That administration was granted earlier than the statute permits to one of a class not preferred therein; or that it was granted to another person than the widow or the next of kin, regardless of the legal priorities.⁶ That administration was granted to a disqualified person or one not entitled at all.⁷ That the preferred party's renunciation was forged or fraudulently procured.⁸ That the judge of probate who granted the letters was an interested party.⁹ In general, that there was essential fraud, error, or mistake

¹ Com. Dig. Administrator. B; Wms. Exrs. 575. Under the New Jersey statute, where letters of administration are revoked for informality or illegality, new letters may be granted to the same person, where such grant is proper, without a new application or notice. *Delany v. Noble*, 3 N. J. Eq. 559.

² *Morgan v. Dodge*, 44 N. H. 255; *Napier, Goods of*, 1 Phillim. 83; *Hooper v. Stewart*, 25 Ala. 408; *Harrington v. Brown*, 5 Pick. 519, 522; *Burns v. Van Loan*, 29 La. Ann. 560. See *Coltart v. Allen*, 40 Ala. 155.

³ Wms. Exrs. 576; *Waters v. Stickney*, 12 Allen, 4; *Hamberlin v. Terry*, 1 Sm. & M. Ch. 589.

⁴ *Edelen v. Edelen*, 10 Md. 52; *Bulkley v. Redmond*, 2 Bradf. (N.Y.) 281.

⁵ *Thomas v. Knighton*, 23 Mo. 318; *Patton's Appeal*, 51 Penn. St. 465; *Baldwin v. Buford*, 4 Yerg. 16.

⁶ *Mills v. Carter*, 8 Blackf. 203; *Williams' Appeal*, 7 Penn. St. 259; *Thompson v. Hucket*, 2 Hill (S. C.) 347; Wms. Exrs. 578; *Stebbins v. Lathrop*, 4 Pick. 33; *Pacheco, Estate of*, 23 Cal. 476.

⁷ *Thomas v. Knighton*, 23 Md. 318; *Harrison v. Clark*, 87 N. Y. 572.

⁸ *Thomas v. Knighton*, 23 Md. 318; *Wilson v. Hoes*, 3 Humph. 142. And see as to renunciation upon a condition not fulfilled, *Rinehart v. Rinehart*, 27 N. J. Eq. 475.

⁹ *Coffin v. Cottle*, 5 Pick. 480; *Echols v. Barrett*, 6 Ga. 443. It is held that an administrator may accept the office of probate judge without vacating the trust of administrator. *Whitworth v. Oliver*, 39 Ala. 286. But *semble* he should resign or be removed if the trust is within the same county jurisdiction, and remains unfulfilled.

in the original decree and appointment.¹ If the grant may be considered voidable rather than void, revocation becomes eminently proper in such cases.

It would appear that a county probate court may, of its own motion, institute and carry on proceedings to revoke its irregular decrees. Yet, as a rule, the private party who, as of right, seeks revocation of an appointment, because some preferred party was passed over, should be of that class himself, and in a position to profit by such revocation.² That the letters testamentary or of administration have irregularly issued without the notice or citation of proper parties, as required by law, is a cause for revoking or vacating the decree, on the application of those entitled to such notice. And the same holds true where a will is admitted to solemn probate, in similar disregard of statute formalities.³ It should, however, be borne in mind that the right to be cited in does not necessarily render an appearance indispensable; and that in granting administration, the failure of one entitled to the trust in preference may often be concluded by his waiver or the failure to seasonably apply or to qualify.⁴ A regular appointment should not be revoked because parties in priority, once concluded by their own acts or laches, seek without special good reason to assert such priority afterwards.⁵

¹ *Hamberlin v. Terry*, 1 Sm. & M. Ch. 589; Com. Dig. Administrator B; *Proctor v. Wanmaker*, 1 Barb. Ch. 302; *Broughton v. Bradley*, 34 Ala. 694.

Where probate of a will has been granted in common form, the executor may be afterwards cited to prove it in solemn form; and if he cannot sufficiently prove it, the probate will be revoked. *Wms. Exrs.* 575; *supra*, § 66. But see *Floyd v. Herring*, 64 N. C. 409.

² *Mecklenburgh v. Bissell*, 2 Jones (N. C.) L. 387; *Edmundson v. Roberts*, 1 How. (Miss.) 217; *De Lane's Case*, 2 Brev. 167. And see *Hardaway v. Parham*, 27 Miss. 103; *Kelly v. West*, 80 N. Y. 139.

³ *Wms. Exrs.* 578; 1 Lev. 305; *Fitzgib.* 303; *Kerr v. Kerr*, 41 N. Y. 272; *Lawrence's Will*, 3 Halst. Ch. 215; *Waters v. Stickney*, 12 Allen, 15; *Wallace v. Walker*, 37 Ga. 265; *McCaffrey's Estate*, 38 Penn. St. 331; *Morgan v. Dodge*, 44 N. H. 260.

⁴ *Stoker v. Kendall*, Busb. (N. C.) L. 242; *Cole v. Dial*, 12 Tex. 100; and see *supra*, § 112. The jurisdiction to revoke in such cases held discretionary under the code in *Hutchinson v. Priddy*, 12 Gratt. 85.

⁵ *Ib.* Nor where letters issued to a competent person will they be revoked upon the subsequent claim of a person who was incompetent at the time of the grant. *Sharpe's Appeal*, 87

That the occasion for a limited or special administration has ceased to exist is good cause for revocation or superse-
dure.¹ The failure to qualify by bond in the first instance
appears in some States to be regarded as cause for revoca-
tion;² but this is only for convenience, and the more correct
view is, that the condition precedent failing, there is no ap-
pointment to be revoked, but rather a supplementary decree
of suitable tenor to be entered.³

§ 154. **Removal of Executor or Administrator.** — Under stat-
utes now in force in most of the United States, the probate
court is empowered to make a vacancy in the fiduciary office
for sundry good causes specified, and to appoint a successor.
Thus, in Massachusetts, if an executor or administrator be-
comes insane, or proves otherwise incapable of discharging
his trust, or for any reason "evidently unsuitable" therefor,
he may be removed, notice of such proceedings having been
given to him and to all parties interested.⁴ Moreover, inas-
much as no one can be appointed without first qualifying by
furnishing a suitable bond, provision is made for the summary
removal of an executor or administrator who, upon being
ordered by the probate court to give a new bond, does not
seasonably comply with the order.⁵ And inexcusable negli-
gence to file an inventory or settle his accounts in court, after
having been duly cited, is sometimes specified as proper cause
for removal.⁶

It is perceived that statutes of this character confer upon
the court, and most appropriately too, a broad discretion as to

Penn. St. 163. This becomes often a
matter of statute construction. See
Dietrich's Succession, 32 La. Ann. 127.

¹ Morgan v. Dodge, 44 N. H. 260;
54 Md. 359.

² See Wingate v. Wooten, 5 Sm. &
M. 245.

³ But it might happen that the court
had imprudently and irregularly issued
the letters without waiting for a proper
bond, in which case revocation or va-
cating the appointment would be suita-
ble, new letters issuing when the requi-
site bond was filed. See Bell, C. J., in

Morgan v. Dodge, 44 N. H. 261. Re-
moval may sometimes reach this case.
See 10 La. Ann. 94.

⁴ Mass. Gen. Stats. c. 101, § 2; c.
100, § 8.

⁵ Mass. Gen. Stats. c. 101, § 17;
Morgan v. Dodge, 44 N. H. 261; De
Flecher, Succession of, 1 La. Ann. 20;
Davenport v. Irvine, 4 J. J. Marsh. 60;
McFadgen v. Council, 81 N. C. 195;
Bills v. Scott, 49 Tex. 430.

⁶ See Mass. Gen. Stats. c. 101, § 2;
c. 99, § 26.

the various instances which may justify removal. Whenever, from any cause, the executor or administrator becomes unable to perform properly the substantial duties of his office, he may be regarded as "evidently unsuitable."¹ Unsuitableness may be inferred also from wilful misconduct, or even from obstinate persistency in a course plainly injurious to the interests of the estate, and impairing its value ; and in fact, as a rule, any unfaithful or incompetent administration, which will sustain an action on one's probate bond, should be sufficient cause for his removal.² Causes of unsuitableness, operating at the time of the appointment, but disclosed more

¹ See *Thayer v. Homer*, 11 Met. 104. Under the Texas act of 1876, a probate judge may of his own motion remove one for failing "to obey any order consistent with this act," etc. *Wright v. McNatt*, 49 Tex. 425.

² As where, the estate being insolvent, the executor or administrator refuses to take steps for recovering property fraudulently conveyed, when the creditors offer to indemnify him. *Andrews v. Tucker*, 7 Pick. 250. Or for his fraud and corrupt dealings. 28 La. Ann. 784. Or where he gives an unauthorized and final preference in paying or distributing (though this, *semble*, should be a case of gross injustice, and not where some reasonable favor was bestowed at discretion). *Foltz v. Prouse*, 17 Ill. 487. Or where he is ignorant of his duties and liable to be imposed upon. *Emerson v. Bowers*, 14 Barb. 658. Or where he has other interests in positive conflict with the official trust. *Thayer v. Homer*, 11 Met. 104; *Hussey v. Coffin*, 1 Allen, 354. Waste, negligence, and mismanagement are good grounds for removal as well as fraud. 3 Nev. 93. And see *Peale v. White*, 7 La. Ann. 449; *Reynolds v. Zink*, 27 Gratt. 29. So is the unwarranted refusal to prosecute claims on behalf of the estate, especially if the office was obtained by inducing those in interest to believe that he would prosecute. *Kellberg's Appeal*, 86 Penn. St. 129. Or

for squandering the estate. *Newcomb v. Williams*, 9 Met. 525. As to removing an executor for "improvidence" under the New York code, see *Freeman v. Kellogg*, 4 Redf. (N. Y.) 218.

But it is no cause for removal that the executor or administrator declines to aid heirs or others outside the line of his official duty. *Richards v. Sweetland*, 6 Cush. 324. Nor that doubtful claims are not prosecuted, especially if the estate be small. *Myrick Prob.* 97. Nor that he makes no returns, when there is nothing to return. *Harris v. Seals*, 29 Ga. 585. Nor where his delays are satisfactorily explained. *Andrews v. Carr*, 2 R. I. 117. Nor, as ruled, simply that he cannot read or write (*cf. supra*, § 104); *Gregg v. Wilson*, 24 Ind. 227. Opportunity to file accounts and inventory should be given if this be the grievance alleged; the court ordering him to account. 28 La. Ann. 800. *Cf.* 77 N. C. 360. As to his bankruptcy, see *Dwight v. Simon*, 4 La. Ann. 490; *Cooper v. Cooper*, 5 N. J. Eq. 9. As to transactions by the executor or administrator, not perhaps justifiable, but held insufficient cause for his removal, see *Carpenter v. Gray*, 32 N. J. Eq. 692; *Killam v. Costley*, 52 Ala. 85. Conflicting interest will not furnish ground for removal except in a clear and extreme case. *Randle v. Carter*, 62 Ala. 95.

fully in the course of administration, and upon experiment, may afford the ground of one's subsequent removal from office; the point here being, not that the unsuitableness operated when the appointment was made, but that it operates at the time of the complaint.¹

Non-residence or the permanent absence of an executor or administrator is made a specific cause of removal by our local statutes under various circumstances; as where such fiduciary neglects, on citation, to render his accounts and settle the estate; or where one moves out of the State without having settled his accounts, or without appointing an attorney, or, as held in some States, if he be a non-resident at all.² On the marriage of a sole executrix or administratrix, her authority as such ceases; and our statutes provide for the grant of administration *de bonis non* in such a case.³

§ 155. **Procedure in Case of Revocation of Appointment or Removal from Office.**—Where one has been regularly appointed, he is not bound to propound his interest in such proceedings until the party calling it in question has established his own position.⁴ And the first duty of the appellant from a decree in probate is to show affirmatively his right to appeal; for, until this is done, or the right admitted by

¹ Drake v. Green, 10 Allen, 124. Cf. Lehr v. Turball, 3 Miss. 905.

² Mass. Gen. Stats. c. 101, § 2; Harris v. Dillard, 31 Ala. 191; local codes. One temporarily absent may often delegate his trust by power of attorney; yet temporary absence to the detriment of the estate might furnish cause for removal. Mere non-residence or absence is not necessarily a disqualification *per se*, or cause for removal, unless the statute so provides. Walker v. Torrance, 12 Ga. 604; McDonogh, Succession of, 7 La. Ann. 472; Wiley v. Brainerd, 11 Vt. 107; Cutler v. Howard, 9 Wis. 309. And though absence from the State may or may not be cause for removal, the administration is not meantime vacant, and a new appoint-

ment cannot be made until the vacancy is made. Hooper v. Scarborough, 57 Ala. 510. See Berry v. Bellows, 30 Ark. 198.

³ Mass. Gen. Stats. c. 101, §§ 1, 4; Whitaker v. Wright, 35 Ark. 511; Duhme v. Young, 3 Bush, 343; Kavanaugh v. Thompson, 16 Ala. 817; Teschemacher v. Thompson, 18 Cal. 111. But as to the effect at common law of joining her husband in the trust, see Schoul. Hus. & Wife, § 163. A formal revocation of authority or removal from office is in some States required before the wife ceases to be the *de facto* and *de jure* incumbent of the office. Frye v. Kimball, 16 Mo. 9; Yates v. Clark, 56 Miss. 212.

⁴ Phillim. 155, 166.

the opposite side, the merits of the appeal will not be entertained.¹ An executor or administrator is entitled to notice and a reasonable opportunity to appear and defend himself in all cases of complaint before he can be properly removed or his letters revoked;² and if his failure to file a bond or increase his security be the cause of removal, it should appear that he was allowed fair time to comply with the order of the court and failed to do so.³ At the hearing for his removal, as well as for the revocation of a probate decree, both petitioner and respondent may offer evidence pertinent to the issue; and either party may appeal from the decree of the court making or refusing to make the removal.⁴

An executor or administrator removed from office should settle his accounts in court and turn over the estate to his successor without delay; otherwise, he and his sureties may be pursued.⁵ Discharge from office relieves from further responsibility, but not from the consequences of malfeasance and neglect while in office. One discharged for pressing cause, such as the insolvency of himself and his sureties

¹ *Pettingill v. Pettingill*, 60 Me. 419. Statutes concerning removal sometimes require the petitioner to show an interest in like manner. *Vail v. Givan*, 55 Ind. 59.

² *Murray v. Oliver*, 3 B. Mon. 1. But the executor or administrator may waive notice by his voluntary appearance. *Ferris v. Ferris*, 89 Ill. 452.

³ *Wingate v. Wooten*, 5 Sm. & M. 245.

⁴ See *Smith* (Mass.) Prob. Pract. 99; *Bailey v. Scott*, 13 Wis. 618. Concerning the method of applying for the revocation of letters or probate, or for the removal of an executor, administrator, or other probate functionary, numerous late decisions are found. The local statute usually enters fully into the details of such proceedings. Removal cannot be demanded by way of opposition, but if at all it must be by direct proceedings with petition and citation. *Boyd, Succession of*, 12 La. Ann. 611. But as to allegations in the petition, see *Neighbors v. Hamlin*, 78 N. C. 42.

Implied revocation of one's authority by such judicial acts as a new appointment is in some States permitted, even though the reason for revocation or removal arose subsequently to the appointment. *Berry v. Bellows*, 30 Ark. 198; *Bailey v. Scott*, 13 Wis. 618. But the more correct practice discountsances implied revocations. See *supra*, § 152. As to superseding a general administrator by the simple probate of a will, and the appointment of executor or administrator with the will annexed without a removal, etc., see *McCauley v. Harvey*, 49 Cal. 497. An incumbent administrator's acceptance of a grant of administration *de bonis non* jointly with another, held equivalent to resigning the former trust. *Turner v. Wilkins*, 56 Ala. 173.

⁵ See *Aldridge v. McClelland*, 34 N. J. Eq. 237; *West v. Waddill*, 33 Ark. 575; *Schlecht's Estate*, 2 Brews. (Pa.) 397.

(which, properly speaking, constitutes ground for removal), is not relieved from the obligation to account; while the interests of an estate may, of course, require one to be thus discharged, or, in general, removed, before any accounting at all.¹

§ 156. **Resignation of Executor or Administrator.**—Removal without cause shown, or by way of favor to the incumbent, would be improper. For such cases, and as a gentler means of vacating an office unsuitably filled, our statutes further provide the opportunity for a fiduciary officer to resign. Thus, in Massachusetts, it is enacted that, upon the request of an executor or administrator, the probate court may, in its discretion, allow him to resign his trust; but the party applying for leave to resign should present his administration account to the court with his petition; nor will his request be allowed until his accounts are settled, after such notice to the parties interested as circumstances may require.² An executor or administrator who has already qualified has, however, been permitted to terminate his trust before he has taken actual possession of the assets or attempted to exercise any control whatever over the estate; in which case, the acceptance of his resignation may be followed, as usual, by the appointment of a successor.³

The correct settlement of one's accounts, and transfer of the balance as the court may direct, is the usual condition upon which resignation is permitted. And where there is a personal trust reposed in an executor under the will, he should not be discharged until he has performed that duty;⁴ nor, in general, ought one's resignation to be accepted

¹ *Union Bank v. Poulson*, 31 N. J. Eq. 239. See 64 Ala. 545.

² Mass. Gen. Stats. c. 101, § 5; *Thayer v. Homer*, 11 Met. 144. See also local codes; *Haynes v. Meek*, 10 Cal. 110; *Carter v. Anderson*, 4 Ga. 516; *Coleman v. Raynor*, 3 Cold. (Tenn.) 25; *Morgan v. Dodge*, 44 N. H. 258.

³ *Comstock v. Crawford*, 3 Wall. 396.

In English practice an executor is permitted to renounce probate even after he has taken the oath of office, if he has not already taken possession or control. 3 Hagg. 216; *Wms. Exrs.* 276, 281. And see *Mitchell v. Adams*, 1 Ired. 298.

⁴ *Lott v. Meacham*, 4 Fla. 144; *Van Wyck, Matter of*, 1 Barb. Ch. 565.

regardless of the detriment which the estate may suffer in consequence.

§ 157. **Jurisdiction, in general, as to Revocation, Removal, and Accepting a Resignation.** — Revocation of letters or a probate appears to be a different thing from the creation of a vacancy in the office by death, removal, or resignation, though the books do not keep this distinction clear. As a general rule, where the probate court has once regularly conferred the appointment, it cannot remove the incumbent afterwards except for causes defined by statute.¹ Nor, if precedents may be trusted, can an executor or administrator, who has once fully accepted and entered upon his trust, resign it unless the statute permits him to; for the English rule always discountenanced such a practice, as to these and similar fiduciaries.² Other courts, therefore, having equity powers, must incline to exercise them in restraint of the probate appointment, where the probate courts have no plenary jurisdiction to remove or accept the resignation of an executor or administrator; appointing, it may be, a receiver of their own, and temporarily restraining the authority of an executor, in an emergency.³ So, too, English practice appears to enlarge the right of revocation, in default of the power to remove; for, as the books say, administration may be revoked if a next of kin to whom it has been committed becomes *non compos* or otherwise incapable, and perhaps, too, if he goes beyond sea.⁴ But in our later Ameri-

¹ *Muirhead v. Muirhead*, 6 Sm. & M. 451.

² 1 Ventr. 335; Wms. Exrs. 281; *Haigood v. Wells*, 1 Hill (S. C.) Ch. 59; *Sears v. Dillingham*, 12 Mass. 358; *Sitzman v. Pacquette*, 13 Wis. 291; *Washington v. Blunt*, 8 Ired. Eq. 253. As to guardians, see Schoul. Dom. Rel. § 315.

³ *Long v. Wortham*, 4 Tex. 381; *Leddell v. Starr*, 4 C. E. Green, 159. See *Cooper v. Cooper*, 5 N. J. Eq. 9; *Wilkins v. Harris*, 1 Wms. (N. C.) Eq. 41; 3 Redf. Wills, 61, 66.

⁴ Bac. Abr. Exrs. etc. E; Wms. Exrs.

579. And yet revocation, so called, appears to involve in probate the idea of vacating that which was originally void or voidable and clogged at the outset. Thus, the appointment of one already *non compos*, like the probate of a will which was not really the last one, is based upon some fundamental error; the decree never should have been entered. But if an appointment be regularly made, while one is sane and competent, his subsequent incompetency does not invalidate the original decree more than his subsequent misconduct;

can practice the court of original probate jurisdiction is the most suitable tribunal in the first instance for revoking such appointments, for removing or accepting resignations, and, in general, for regulating the succession in the office of executor or administrator; and to such courts the statute authority chiefly relates.¹

§ 158. **Natural Termination of an Executor's or Administrator's Authority.** — The death of an executor or administrator, leaving his trust unperformed, gives occasion, of course, to the appointment of a successor; and death in any event terminates his own functions; his estate continuing liable for any maladministration on his part while in office. It is not usual to discharge such an officer formally, even though his trust be fully performed; but on the approval of his final account, no appeal being taken, and the final distribution of the estate, it may at all events be presumed that his functions have reached their natural end.²

§ 159. **Delegation of Authority does not relieve; but Supersedeure does.** — An executor or administrator cannot, by delegation of his own authority, avoid any of the liabilities imposed on him by law.³ But it is otherwise, where a court having jurisdiction supersedes his authority, and vests the new appointee with his functions.

§ 160. **The Effect of Probate Decrees.** — Concerning the legal effect of the revocation of probate or letters on the intermediate acts of the former executor or administrator, a dis-

the decree was good, but the case calls later for removal from office. See *post*, effect of revocation.

¹ See *Waters v. Stickney*, 12 Allen, 15; *Ledbetter v. Lofton*, 1 Murph. (N. C.) 224; *Hosack v. Rogers*, 11 Paige, 603; *Chew v. Chew*, 3 Grant (Pa.) 289; *Wilson v. Frazier*, 2 Humph. 30. In New Jersey, where chancery courts exercise similar powers with those of England, it is held that the court of probate alone can remove an executor; but that chancery may intervene, as to the functions of trustee, where these are

exercised also by the executor, and also enjoin the executor from acting where he is likely to abuse his authority. *Leddell v. Starr*, 4 C. E. Green, 159.

² See *post* as to distribution and accounts. Under the Louisiana code of 1808, the office of testamentary executor expired at the end of the year, unless the will expressed otherwise or the term of office was prolonged by the judge. *Deranco v. Montgomery*, 13 La. Ann. 513.

³ *Driver v. Riddle*, 8 Port. (Ala.) 343; *Bird v. Jones*, 5 La. Ann. 645.

inction is made in the books between grants void and voidable. A grant utterly void and without jurisdiction, as in the case of administration upon the estate of a living person, gives no shelter to the acts of the appointee; and revocation in such case appears to be only for the sake of correcting the records and preventing further mischief.¹ The grant of administration on the estate of a decedent, while a will was in existence, being for a time concealed, is treated as void with similar consequences;² and so, too, is it, we may presume, where the grant was under a certain will, and a later will came to light afterwards, conferring the executorship elsewhere, and making a different disposition of the estate.³ The sale or collection of one's property under such circumstances, by the wrongful representative, may (subject to the usual exceptions in favor of *bona fide* third parties, and negotiable instruments) be avoided by the living person who was supposed dead, or, as the case may be, by the rightful representative of his estate duly appointed; trover or detinue for the property may be maintained, or assumpsit for the money produced (the tort being waived), as so much money received to the use of the rightful party.⁴ Nor is it certain how far the defendant thus sued shall be permitted to recoup, by way of offset, payments made in due course of administration, or for debts which were lawfully due from the supposed decedent or his estate; though, doubtless, such recoupment is to some extent proper.⁵

¹ In *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87, the living depositor was allowed to sue for his deposit, notwithstanding an administration had been granted on due presumption of his death, and payment was made to such administrator. And see *Burns v. Van Loan*, 29 La. Ann. 560; *Moore v. Smith*, 11 Rich. 569.

² See English case of *Graysbrook v. Fox*, Plowd. 276; Wms. Exrs. 586, 587. Not necessarily, however, where the will was foreign, and local jurisdiction arose because of local assets. *Shephard v. Rhodes*, 60 Ill. 301. See next page.

³ *Woolley v. Clark*, 5 B. & Ald. 744.

A similar fatal consequence has been held to attend the grant of letters by an interested judge. *Gay v. Minot*, 3 Cush. 352. *Sed qu.*, unless a statute is explicit on this point. See *Aldrich, Appellant*, 110 Mass. 193; *Moses v. Julian*, 45 N. H. 52. Where a will admitted to probate is declared void on appeal, letters under the will cannot issue properly. *Smith v. Stockbridge*, 39 Md. 640; 3 Ired. 557.

⁴ *Lamine v. Dorrell*, 2 Ld. Raym. 1216; *Woolley v. Clark*, 5 B. & Ald. 744; *Dickinson v. Naul*, 4 B. & Ad. 638; Wms. Exrs. 587.

⁵ In *Graysbrook v. Fox*, Plowd. 276, it

Where, however, the grant was voidable only, as in case letters of administration are issued by a competent court to a party not entitled to priority, and without citation of those so entitled or their renunciation, all the lawful and usual acts of the appointee performed meanwhile, and not inconsistent with his grant, shall stand good until the authority is revoked.¹ If, after administration has been granted, a will is produced for probate, acts performed under the grant in good faith are sometimes held valid.²

It has been laid down, and quite broadly, that a payment *bond fide* made to any *de facto* executor or administrator, appointed by a court of competent jurisdiction, will discharge the debtor.³ This rule has been applied to the case of a probate which was afterwards declared null, because of a forged will; and upon the sensible reasoning that the debtor cannot controvert the title of the executor, who presses him, so long as the probate remains unrepealed, nor possess himself of the means of procuring such repeal.⁴ Statutes now in force confirm and enlarge the validity of payments made *bond fide* to any executor or administrator, under a probate or administration afterwards revoked, if made before revocation, declaring such payment to be a legal discharge to the person making it.⁵

After revocation or the removal of an executor or administrator from office, or the acceptance of his resignation, he cannot complete a sale which he had been negotiating on behalf of the estate;⁶ nor collect assets;⁷ nor carry on or de-

was ruled that if the sale had been made to discharge funeral expenses or debts which the executor or administrator was compelled to pay, the sale would have been indefeasible forever. But *cf.* Woolley *v.* Clark, 5 B. & Ald. 744; Wms. Exrs. 271, 588. And see *post* as to executors *de son tort*.

A grant of letters to one who has not qualified by giving the statute bond is void. Bradley *v.* Commonwealth, 31 Penn. St. 522. In such case the appointment perhaps was never completed, properly speaking. *Supra*, § 153.

¹ Wms. Exrs. 588, and cases cited; Kelley *v.* West, 80 N. Y. 139; Pick *v.* Strong, 26 Minn. 303.

² Kittredge *v.* Folsom, 8 N. H. 98; Kane *v.* Paul, 14 Pet. 33; Bigelow *v.* Bigelow, 4 Ohio, 138.

³ Wms. Exrs. 590, and cases cited.

⁴ Allen *v.* Dundas, 3 T. R. 125; Best, J., in Woolley *v.* Clark, 5 B. & Ald. 746.

⁵ Stat. 20 & 21 Vict. c. 77; Wms. Exrs. 591, 592; Hood *v.* Barrington, L. R. 6 Eq. 222.

⁶ Owens *v.* Cowan, 7 B. Mon. 152.

⁷ Stubblefield *v.* McRaven, 5 Sm. &

pend a suit in his official capacity;¹ nor in general exercise the functions of his late office.

English and American statutes in modern times aim to correct the legal mischief of overturning acts performed in good faith and pursuant to a probate or letters of appointment afterwards set aside for cause. Apart from any right to recoup for funeral and other lawful debts of the deceased, it is expressly provided by the English Act 20 & 21 Vict. c. 77, that the executor or administrator who shall have acted under a revoked probate or administration may retain and reimburse himself in respect of any payments made by him which the person to whom probate or letters of administration are afterwards granted might have lawfully made. American legislation is also found providing for the relief of the parties affected, in cases where the appointment of an executor or administrator shall be vacated or declared void afterwards.² And the rule to be favored at the present day is, that all acts done in the due and legal course of administration are valid and binding on all interested, even though the letters issued by the court be afterwards revoked or the incumbent discharged from his trust.³ And although one's appointment as executor or administrator may have been erroneous, the safer doctrine is, that the letters and grant issued from the probate court shall not be attacked collaterally where the court had

M. 130. He may be enjoined from doing so by a court of chancery. *Stubblefield v. McRaven*, ib.

¹ Formerly such a suit would have abated, unless judgment had been obtained by such executor or administrator, but modern practice acts avoid such inconvenience to the estate. *Wms. Exrs.* 592. Judgment cannot be rendered against a displaced executor or administrator. *Wms. Exrs.* 594; *Wiggin v. Plumer*, 31 N. H. 251; *National Bank v. Stanton*, 116 Mass. 435; 26 Tex. 530. But removal from a trusteeship is not necessarily a removal from the executorship. 22 Hun, 86. Statutes control this subject which regard the interests of the estate. *Ib.*

² *Wms. Exrs.* 592; *McFeely v.*

Scott, 128 Mass. 16. And see 3 Wash. C. C. 122.

³ *Foster v. Brown*, 1 Bailey (S. C.) 221; *Brown v. Brown*, 7 Oreg. 285; *Shephard v. Rhodes*, 60 Ill. 301. As to a public administrator whose office has expired, see *Rogers v. Hoherlein*, 11 Cal. 120; *Beale v. Hall*, 22 Ga. 431.

As between revocation of an appointment and the creation of a vacancy by death, removal, or resignation, it would appear on principle that, in the former instance, further proceedings are *de novo*, giving rise to an original appointment by new letters; while, in the latter, there arises successorship, and the proper appointment for the vacancy should be by letters *de bonis non*. See *Callahan v. Smith*, T. U. P. Charlt. (Ga.) 149.

jurisdiction at all, and least of all by common-law courts;¹ and statutes extend this principle to cases where there was no jurisdiction, provided no want of jurisdiction appear of record;² thus, in fine, discouraging collateral issues of fact upon a grant of authority which appears regular on its face, and making such decrees voidable, in effect, until vacated, and not utterly void. And a similar rule applies to the probate decree which discharges an appointee or revokes his appointment.³ But the grant of letters by a local probate court, having no jurisdiction of the person or subject-matter, will not bind the competent probate tribunal; which latter tribunal may proceed to grant letters, though the void grant by the former tribunal be not revoked.⁴

The conclusiveness of probate decrees is deducible from such exclusive jurisdiction as may be conferred upon probate courts to decide on the validity of wills, to grant administration, and to supervise the settlement of the estates of deceased persons. And according as the local statute may extend or limit this special jurisdiction, so must the effect of such decrees be determined. Probate courts are usually made courts of record, and treated as courts of general jurisdiction on all subjects pertaining to their peculiar functions.⁵

Formerly, in the English ecclesiastical practice, probate did not authenticate a will of real estate;⁶ but in England and most American States, at the present day, the statute jurisdiction of courts of probate extends to wills of both real and personal property without distinction.⁷ The probate or

¹ *Peters v. Peters*, 8 Cush. 542; *Wms. Exrs.* 549; 2 Vern. 76; 3 T. R. 125; *Boody v. Emerson*, 17 N. H. 577; *Clark v. Pishon*, 31 Me. 503; *Naylor v. Moffatt*, 29 Mo. 126; *Fisher v. Bassett*, 9 Leigh, 119; *Morgan v. Locke*, 28 La. Ann. 806; *Taylor v. Hosick*, 13 Kan. 518; *Hart v. Bostwick*, 14 Fla. 162; *Burnett v. Nesmith*, 62 Ala. 261; *Pick v. Strong*, 26 Minn. 303; *Wright v. Wallbaum*, 39 Ill. 554. And especially not by a person not "interested" in legal contemplation. *Taylor v. Hosick*, 13 Kan. 518.

² *McFeely v. Scott*, 128 Mass. 16; *Record v. Howard*, 58 Me. 225.

³ *Simpson v. Cook*, 24 Minn. 180; *Bean v. Chapman*, 62 Ala. 58.

⁴ *Barker, Ex parte*, 2 Leigh, 719.

⁵ *Waters v. Stickney*, 12 Allen, 3; *Stearns v. Wright*, 51 N. H. 609, and cases cited.

⁶ 2 Campb. 389; *Carroll v. Carroll*, 60 N. Y. 125.

⁷ See English Court of Probate Act, 1857, 20 & 21 Vict. c. 77; *supra*, § 8; *Parker v. Parker*, 11 Cush. 525.

grant is conclusive upon all persons interested, whether infants, persons *non compos*, or absentees; provided citation was duly granted in the premises.¹ But the probate of a will, while stamping it as authentic and originally valid, does not interpret the document.² Probate and letters furnish no proof of death for the suits of strangers;³ though to dispute thus an executor's or administrator's authority, in his own suit, should require appropriate pleading, an admission of his authority being admission of the death essential to such authority, so as to dispense with other proof.⁴ Nor does the legal conclusiveness attaching to probate decrees prevent proof, in a collateral suit, that the pretended decree in question was a forgery, or that the alleged appointment has been revoked; for this is to affirm what is of genuine probate record.⁵

§ 161. **Effect of an Appeal from Probate.** — The usual effect of an appeal from probate, or from one's appointment as executor or administrator, is to suspend the authority conferred by such appointment; and pending such appeal, and until termination of the controversy, it is a special administrator, if any appointee, who should protect the estate.⁶ An appeal by the executor or administrator from a decree revoking his authority, leaves him, of course, without authority.⁷

¹ Wms. Exrs. 565.

² *Holman v. Perry*, 4 Met. 492, 497; *Fallon v. Chidester*, 46 Iowa, 588. The probate ascertains nothing but the original validity of the will as such, and that the instrument, in fact, is what it purports on its face to be. Fuller, *Ex parte*, 2 Story, 332.

³ The death of the deceased is a fact not usually passed carefully upon in granting letters, but is rather assumed by the probate court upon very slight *prima facie* evidence or the petitioner's allegation. Hence, it is held, in suits between strangers, as where the widow sues upon an insurance policy on the life of her husband, that letters of administration issued upon his estate fur-

nish no proof of his death. *Mutual Benefit Life Ins. Co. v. Tisdale*, 91 U. S. Supr. 238; *Carroll v. Carroll*, 60 N. Y. 121.

⁴ *Lloyd v. Finlayson*, 2 Esp. 564; *Newman v. Jenkins*, 10 Pick. 515. The fact that one is executor or administrator may be traversed in pleading. Wms. Exrs. 560, 561; Plowd. 282.

⁵ 1 Stra. 671; Wms. Exrs. 563.

⁶ Wms. Exrs. 588. But an executor duly qualified upon probate of a will in common form may continue to act, notwithstanding an issue joined afterwards testing the validity of the will as to real estate only. *Byrn v. Fleming*, 3 Head, 658.

⁷ *Thompson v. Knight*, 23 Ga. 399.

CHAPTER VII.

FOREIGN AND ANCILLARY APPOINTMENTS.

§ 162. **The Subject of Foreign and Ancillary Appointments considered frequently in the United States but not in England.** — The subject of foreign and ancillary appointments is considered frequently, in connection with administration of the estates of deceased persons, in the United States; but seldom, comparatively speaking, in England. There probate jurisdiction is always domestic, save as to colonies and foreign countries; but here it is strictly domestic only in pertaining to some particular State. A person may be domiciled in one State jurisdiction at the time of his death, and yet leave property which another State can reach by its own independent process, under circumstances justifying its own territorial grant of administration; and cases may arise, though in practice more rarely, by comparison, where there are found local assets of some foreigner who died testate or intestate, leaving an estate in his own country to be administered. Domestic probate jurisdiction is here internal, in other words, either as respects other States in the same federal Union, or other countries.¹

§ 163. **What is Ancillary Administration.** — We have seen that original letters of administration may be taken out upon the estate of a foreigner, on the ground that local assets are within the jurisdiction and there is occasion for such appointment; and further, that the non-existence of known kindred will not debar the local probate court from granting these letters. Such a grant, however, is founded usually upon ignorance of any last will of the deceased, or of any probate or principal administration duly granted in the courts of his

¹ See *supra* §§ 15-20, on the subject of conflict of laws.

last domicile;¹ hence, the administration is looked upon as sufficiently a principal one for the convenience of the court and of the sovereign authority which exercises jurisdiction in the premises. But were such a foreign will or a foreign appointment of executor or principal administrator known to exist, the case would be properly treated, in England and the United States, on the principles of comity; international, or inter-State comity, as the case might be. And regarding the fundamental rules of comity, principal administration is properly that of the country or State only where the deceased person had his last domicile; administration taken out elsewhere, in the country or State where assets were locally situate, being known as *ancillary* (that is to say, auxiliary or subordinate) administration. In the course of this treatise it will be seen that one who actually officiates as ancillary administrator observes somewhat peculiar rules as to managing and settling the estate. And in the present chapter we shall first observe that peculiar rules guide the court with respect to the character and method of making the ancillary appointment.²

§ 164. **Letters Testamentary or of Administration have no Extra-territorial Force.**—The first proposition to be laid down, with reference to foreign and domestic, principal and ancillary administration, is that, according to the recognized law both of England and the United States, letters granted abroad confer, as such, no authority to sue or be sued, or to exercise the functions of the office in another jurisdiction; though they may afford ground for specially conferring a probate authority within such other jurisdiction; and the same person sometimes qualifies as principal and ancillary representative. Hence, letters testamentary granted to an executor in one State or country have no extra-territorial force.³ And an administrator has no authority beyond the

¹ *Supra* §§ 15–20.

² *Enohin v. Wylie*, 10 H. L. Cas. 19,

³ *Stevens v. Gaylord*, 11 Mass. 256; *per* Lord Cranworth; 2 Cl. & Fin. 84; *Merrill v. N. E. Mut. Life Ins. Co.*, 103 3 Q. B. 507; *Wms. Exrs.* 7th Eng. ed. Mass. 245; *Clark v. Clement*, 33 N. H. 362; *Kerr v. Moon*, 9 Wheat. 565; 567; *Childress v. Bennett*, 10 Ala. 751. *Stearns v. Burnham*, 5 Greenl. (Me.)

limits of the State or country in which he was appointed.¹ In either case, one must be confirmed in his authority by the courts of the State or country in which property is situated or debts are owing before he can effectually administer the property or collect the debts there.

§ 165. **Each Sovereignty competent to confer a Probate Authority within its own Jurisdiction.**—A second proposition (which may be regarded as the correlative of the preceding, and universally recognized both in England and the United States) is, that each independent sovereignty considers itself competent to confer, whenever there is occasion, a probate authority, whether by letters testamentary or of administration, which shall operate exclusively and universally within its own sovereign jurisdiction, there being property of the deceased person, or lawful debts owing, within reach of its own mandate and judicial process.² Such sovereign jurisdiction is not national, of necessity; for in the United States, agreeably to the limitations of our federal constitution, it applies as between the several States.

§ 166. **Local Sovereignty recognizes Limitations grounded in Comity, Good Policy, and Natural Justice.**—But we may remark again, that, competent as each sovereign jurisdiction regards itself, in this matter, limitations are nevertheless placed to the exercise of such authority, out of respect to

261; *Harper v. Butler*, 2 Pet. 239; *Trecothick v. Austin*, 4 Mas. 16; *Reynold v. Torrance*, 2 Brev. 59; *Naylor v. Moffatt*, 29 Mo. 126; *Gilman v. Gilman*, 54 Me. 453; *supra* § 15.

¹ *Picquet v. Swan*, 3 Mas. 469; *Mason v. Nutt*, 19 La. Ann. 41; *Cutter v. Davenport*, 1 Pick. 81; *Dorsey v. Dorsey*, 5 J. J. Marsh. 280; *Williams v. Storrs*, 6 Johns. Ch. 353; *Vaughn v. Barret*, 5 Vt. 333; *Willard v. Hammond*, 21 N. H. 382; *McCarty v. Hall*, 13 Mo. 480; *Smith v. Guild*, 34 Me. 443; *Nowler v. Coit*, 1 Ohio, 519; *Carmichael v. Ray*, 1 Rich. 116; *Sheldon v. Rice*, 30 Mich. 296.

² *Banta v. Moore*, 15 N. J. Eq. 97; *Naylor v. Moffatt*, 29 Mo. 126. Thus, in England, one having an English appointment as executor is permitted to sue there in respect of foreign assets, so far as local courts can be of service to him. *Whyte v. Rose*, 3 Q. B. 493. And see *Reynolds v. Kortwright*, 18 Beav. 417; *Price v. Dewhurst*, 4 M. & Cr. 76. And whether the local property shall be remitted abroad is matter of local discretion. *Fretwell v. Lemoire*, 52 Ala. 124; *Mackey v. Coxe*, 18 How. (U. S.) 100; *Carmichael v. Ray*, 5 Ired. Eq. 365.

comity, good policy, and natural justice; which limitations we shall find respected by local legislatures and the local courts of England and the United States. And hence our third proposition: that in practice, the local sovereignty, State or national, permits letters to issue upon the estates of deceased non-residents, mainly for the purpose of conveniently subjecting such assets to the claims of creditors entitled to sue in the local courts, and for appropriating whatever balance may remain to the State or sovereign, by way of distribution, in default of known legatees or kindred. If, therefore, the non-resident proves to have left legatees and a will whose probate may be established, or kindred lawfully entitled to distribution, or foreign creditors, the rights of all parties thus interested should be respected; and, subject to local demands upon the estate, the local administration and settlement of the estate will be regulated accordingly.¹

§ 167. **Administration in the last Domicile is the Principal; other Administrations are Ancillary.**—Our fourth proposition is, that regarding this subject from an international standpoint, wherever authority to administer the estate of one deceased, testate or intestate, is granted in two or more competent jurisdictions, the principal administration or appointment must be that where the deceased had his last domicile; and that administration, or an appointment granted elsewhere, or because of local property or assets, is ancillary merely.² And this chiefly because, as an international doctrine, it is usually conceded that the law of the domicile of the owner of personal property governs in regard to the right of succession, whether such owner die testate or intestate;³ or to cite the broader fundamental maxim, *mobilia sequuntur personam*.⁴

¹ See *post* as to distribution in cases of ancillary administration; *Davis v. Estey*, 8 Pick. 475; *Mitchell v. Cox*, 22 Ga. 32; *Normand v. Gognard*, 14 N. J. L. 425. *v. Pippin*, 15 Mo. 118; *Clark v. Clement*, 33 N. H. 563; *Collins v. Bankhead*, 1 Strobb. (S. C.) 25; *Green v. Rugely*, 23 Tex. 539.

² *Fay v. Haven*, 3 Met. (Mass.) 109; *Merrill v. N. E. Life Ins. Co.*, 103 Mass. 245; *Childress v. Bennett*, 10 Ala. 751; *Perkins v. Stone*, 18 Conn. 270; *Adams v. Adams*, 11 B. Mon. 77; *Spradling*

³ See Sir Cresswell Cresswell in *Crispin v. Doglioni*, 9 Jur. N. S. 653; s. c. L. R. 1 H. L. 301; *Enohin v. Wylie*, 10 H. L. Cas. 1.

⁴ Movables follow the person.

§ 168. **Principal Letters need not precede the Ancillary.** — But, fifth, since each local sovereignty may act independently of all others in conferring the local grant, out of regard to local convenience, and since what might otherwise be or become ancillary may stand alone, it is not necessary that principal and ancillary administration should be committed in consecutive order. Thus, the will of a non-resident testator need not be proved in the State or country of his last domicile, before the domestic State can grant valid letters upon his estate situated within its local confines;¹ though, if it were shown after the domestic State had granted letters as upon an intestate estate, that the deceased left a will which was duly probated in his last and foreign domicile, the domestic domicile should revoke the grant and proceed to appoint as in case of testacy.² Nor is it essential that administration be granted on an intestate estate, in the place of the domicile of the deceased, before an administrator is appointed in another State or country, where, agreeably to local law, administration is proper.³ And once more, administration granted in one State, on property there situated of a resident of another State, is not impaired or abridged by the previous grant of administration in such other State;⁴ though the distribution and final disposition of proceeds may be affected in consequence.

§ 169. **Foreign and Domestic Probate and Letters Testamentary; English Doctrine.** — The foregoing are the propositions mainly to be considered in the present connection; and now to apply them to the probate of wills and the grant of letters testamentary. In England, the last domicile of the deceased is firmly respected, in all matters of administration as to personalty. "All questions of testacy or intestacy," observes Lord Chancellor Cranworth, in a modern case,⁵ "belong to the

¹ *Bowdoin v. Holland*, 10 Cush. 17; *Burnley v. Duke*, 1 Rand. (Va.) 108.

² See *Shepherd v. Rhodes*, 60 Ill. 301.

³ *Stevens v. Gaylord*, 11 Mass. 256; *Pinney v. McGregory*, 102 Mass. 192; *Rosenthal v. Remick*, 44 Ill. 202.

⁴ *Crosby v. Gilchrist*, 7 Dana, 206; *Pond v. Makepeace*, 2 Met. 114.

⁵ *Enohin v. Wylie*, 10 H. L. Cas. 1, cited by Sir Cresswell Cresswell in *Crispin v. Doglioni*, L. R. 1 H. L. 301.

judge of the domicile. It is the right and duty of that judge to constitute the personal representative of the deceased. To the court of the domicile belong the interpretation and construction of the will of the testator.¹ To determine who are the next of kin or heirs of the personal estate of the testator, is the prerogative of the judge of the domicile. In short, the court of domicile is the *forum concursus* to which the legatees, under the will of the testator, or the parties entitled to the distribution of the estate of an intestate, are required to resort." And hence, as between testacy or intestacy, it is held that the courts of the last domicile must determine; and that, so far as personalty is concerned, a will must be executed according to the law of the country where the testator was domiciled at the time of his death.² An English court of probate jurisdiction may, doubtless, ascertain what was in fact the last domicile of the party whose will has been presented for probate; but if probate be judicially granted, the conclusive inference is, that the will must have been executed according to the law of testator's last domicile.³ We here refer to wills of personalty, in strictness; for, with respect to real property, the descent, devise, or conveyance thereof, and other general incidents affecting its title and transfer, the law of local situation appears to have constantly prevailed in English law.⁴

Accordingly, the will, so far at least as personalty is con-

¹ This statement is subject to qualification. Domestic courts incline to weigh the foreign proofs and explanations procurable, but with such extraneous assistance to interpret the instrument upon domestic principles of construction. See *Wms. Exrs.* 370, 371, and *Perkins's n.*; *Di Sora v. Phillipps*, 10 H. L. Cas. 633, 639, 640; *United States v. McRae*, L. R. 3 Ch. 86. And see in general *Story Conf. Laws*, § 638; *supra*, §§ 15, 17.

² *Whicker v. Hume*, 7 H. L. Cas. 124; *Douglas v. Cooper*, 3 Myl. & K. 378; 1 Redf. Wills, 4th ed. 397.

³ 1 Redf. Wills, 398; *Whicker v. Hume*, 7 H. L. Cas. 124. But where the

transcript of foreign probate fails to show an adjudication by the court, but that the clerk issued the letters on his own authority, this is a ministerial act on the face, and the domestic court may inquire collaterally into the sufficiency of the grant. *Illinois Central R. v. Crazin*, 71 Ill. 177.

⁴ 1 Vern. 85; *Brodie v. Barry*, 2 V. & B. 131; *Freke v. Lord Carbery*, L. R. 16 Eq. 461. See act 24 & 25 Vict. c. 114; the new English wills act. Modern jurisprudence favors the execution of wills with the same formalities, regardless of the character of the property to be transmitted. *Supra*, § 8.

cerned, must conform to the place of the testator's last domicile; and the law of this last domicile decides, as to one domiciled abroad, what was his last will, how and by whom such will is to be executed, and in general, all questions of one's testacy, testamentary capacity, and disposing power.¹ Modern statutes and modern probate practice provide for the authentication of foreign wills where local and domestic convenience requires it. An official copy of the probate, or act of recognition of the will by the court of such foreign domicile, should be produced before the local probate tribunal, with a translation or re-translation of the will, as may be deemed suitable.²

Under a will of this character thus exemplified, the foreign executor is respected in the English courts. If the executor, constituted under a foreign will, finds occasion to institute a suit in English jurisdiction for the purpose of recovering local assets, he must prove his will before the English probate tribunal, and procure local authority or constitute some personal ancillary representative, as by virtue of his foreign appointment. And so, too, where it is intended that the foreign will shall operate upon local property.³ Without an English grant he cannot sue or exercise general authority as to English assets of the estate. But the probate tribunals of England will, in such cases, follow the grant of the court of that foreign country where the deceased died domiciled; and the last will sanctioning his appointment having been authenticated abroad and proved by exemplified copy in the proper English probate court, the latter court will clothe him with the needful ancillary authority to enable him to execute his local functions.⁴ As to the probate tribunal and the general

¹ 1 Redf. Wills, 405, 409; 1 Hagg. Ec. 373, 498; *Price v. Dewhurst*, 4 M. & Cr. 76, 82; Wms. Exrs. 366.

² De Vigny, *In re*, 13 L. T. N. S. 246; *L'Fit v. L'Batt*, 1 P. Wms. 526.

³ Wms. Exrs. 362.

⁴ Wms. Exrs. 370; *Enohin v. Wylie*, 10 H. L. Cas. 14. The duly appointed attorney of the person in interest may be selected to administer under the will

upon the usual principles. *Dost Ali Khan, Goods of*, L. R. & P. D. 6. The English statute 24 & 25 Vict. c. 114, provides as to wills made by British subjects dying after August 6, 1861, that every such will made out of the kingdom shall, as regards personal estate, be held to be well executed, if made according to the law of the place where it was made, or where a testator was then

mode of administration, and to a certain extent in the construction of the will, the law of the place where the personal estate is situated, and where ancillary letters are sought, must prevail.¹

§ 170. **The same Subject; American Doctrine.**—In the United States the same general rules prevail as to probate and executors, subject, however, to much statute regulation. Probate and administration are local, and the foreign executor has no authority as such which local tribunals are bound to obey.² It has been regarded as not indispensable to the proof of a foreign will, in the courts of another place than that of the testator's domicile, that the foreign probate should be recorded in the domestic probate court; though it must be shown in evidence that the will has been duly admitted to probate in the proper tribunal of the testator's domicile.³ But it is now the American practice, fortified by local legislation, for the executor or other person interested in a will, which has been proved and allowed in any other of the United States or in a foreign country, to produce a copy of the will and of the probate thereof, duly authenticated, to the probate court in any county of the domestic State in which there is any estate real or personal upon which the will may operate, or assets; and upon his petition, after due citation and a hearing, the court orders the copy to be filed and recorded. This gives the will the same effect as if it had been originally proved and allowed in such domestic State. After the will

domiciled, or where he had his domicile of origin. See *Wms. Exrs.* 374. This changes much of the law previously in force in that country on the subject. Apart from such legislation (which does not apply to aliens) the will of a foreigner executed abroad with English formalities is not on that consideration entitled to English probate. *Von Ruseck*, Goods of, L. R. 6 P. D. 211; *Gatti*, Goods of, 27 W. R. 323. See as to Scotch assets, *Sterling-Maxwell v. Cartwright*, L. R. 9 Ch. D. 173; L. R. 11 Ch. D. 522; *Wms. Exrs.* 363.

¹ 1 Redf. Wills, 399; *Price v. Dewhurst*, 4 M. & Cr. 76; *Reynolds v. Kortwright*, 18 Beav. 417; *supra*, §§ 15-17. As to the will of a foreigner made in England according to English law, see *Lacroix*, Goods of, L. R. 2 P. D. 97; *Gally*, Goods of, 24 W. R. 1018.

² See *supra*, § 164. A court of one State need not recognize the removal of an executor there appointed, which the court of another State orders. *Tillman v. Walkup*, 7 S. C. 60.

³ *Townsend v. Moore*, 8 Jones Law, 187; *Jemison v. Smith*, 37 Ala. 185.

is so allowed and ordered to be recorded, the court grants letters testamentary or of administration with the will annexed, with a qualification as circumstances may require, and proceeds to the settlement of the estate which may be found in such State.¹

§ 171. **Whether Will, to be operative, must conform to the Law of Last Domicile.** — Aside from statute, a will to be operative must, according to the better authority, conform to the law of the place of the testator's last domicile.² But, by statute, it is now quite frequently provided that a will executed out of the local jurisdiction, in conformity with the law of the place where made, shall effectually prevail within such local jurisdiction. The formal probate of such a will is the same as that usually pursued; the testator's soundness of mind, capacity, and disposing intent should appear; and though the particular facts to be proved must depend upon requirements of the local law in which the will was executed, the same certainty of proof is essential as if the will had been made in the place of local jurisdiction.³ There has been much conflict, and among continental jurists especially, as to whether a will executed in accordance with the law, both of the place where made and of the testator's domicile at the time of its execution, shall be inoperative merely for not conforming with the law of the place of the testator's domicile

¹ See *Beers v. Shannon*, 73 N. Y. 292; *Mass. Gen. Stats. c. 92*; *Parker v. Parker*, 11 Cush. 519; *Leland v. Manning*, 4 Hun (N. Y.) 7; *Arnold v. Arnold*, 62 Ga. 627; *Butler's Succession*, 30 La. Ann. 887. The copy of the will and of the decree of the court of original jurisdiction are conclusive, in the absence of fraud, of all the facts necessary to the establishment of the will, the regularity of the proceedings, etc. *Crippen v. Dexter*, 13 Gray, 330. The object is to furnish genuine documentary proof of the original probate. *Helme v. Sanders*, 3 Hawks, 566. That the court of local assets is not to meddle with the domiciliary probate, or raise is-

sues which properly belong to that forum to determine, see *Loring v. Oakley*, 98 Mass. 267. As to a foreign transcript indicating no adjudication, see *Illinois Central R. v. Crazin*, 71 Ill. 177.

An executor appointed in the State where the testator was domiciled may accept the office in such State and renounce it in the State of local assets. *Hooper v. Moore*, 5 Jones L. 130.

² 1 Redf. Wills, 401; *Story Confl. Laws*, § 468; 1 Binn. 336; *Stanley v. Bernes*, 3 Hagg. 373; *Moore v. Darrell*, 4 Hagg. 346. But *cf.* *Roberts's Will*, 8 Paige, 519; *Curling v. Thornton*, 2 Add. 6, 10.

³ See *Bayley v. Bailey*, 5 Cush. 245.

at the time of his death;¹ but even here the general rule obtains, requiring conformity to the law of last domicile under all circumstances; which rule, however, has been reversed by legislation as to personal property, if not property whether real or personal.²

§ 172. **Foreign and Domestic Administration.** — Next, as to administration and the estates of intestates. Administration must be taken out in the State or country where there are assets to be administered, as well as in the country of the intestate's last domicile; for, as we have seen, a local appointment can alone confer local authority.³ Administration, whether principal or ancillary, aims in theory to distribute according to the law of the country in which the deceased had his last domicile; and the right of appointment might well follow the interest accordingly;⁴ nevertheless, statutes in force at the place where jurisdiction is taken, practically control the subject.⁵ Under, or independently of statute provisions, the rule generally obtains in England and our several States, that whenever an intestate foreigner or non-resident dies leaving estate to be administered in the local jurisdiction, administration of such estate may therein be granted; such administration, in case of a grant in the jurisdiction where the intestate had his last domicile, becoming ancillary to the principal grant. The law of the local situation of the personalty

¹ *Moultrie v. Hunt*, 23 N. Y. 394; *Irwin's Appeal*, 33 Conn. 128; *Story Conf. Laws*, § 473.

² English act 24 & 25 Vict. c. 114; *Bayley v. Bailey*, 5 Cush. 245; 1 Redf. Wills, 404; *supra*, § 169.

³ *Supra*, § 22.

⁴ *Wms. Exrs.* 430; *Johnston, Goods of*, 4 Hagg. 182. A party who applies as agent of a non-resident entitled to administer must exhibit proper authority. 1 Hagg. 93.

⁵ This subject receives consideration in c. 3, *supra*. It would appear that a foreign consul has no right, on principle of mere comity, to take possession of a deceased foreigner's estate in a particu-

lar local jurisdiction. Local statutes, which vest the right in a public administrator, or other local functionary, are decisive of the local controversy. See *Aspinwall v. Queen's Proctor*, 2 Curt. 241. The English statute 24 & 25 Vict. c. 121, provides that the consul of a foreign State may administer in English jurisdiction, where reciprocal rights are secured by convention in such foreign State to British consuls. *Wms. Exrs.* 430. But the nature of probate jurisdiction in our several States forbids, apparently, any treaty stipulation of this kind on the part of the United States government.

governs the grant of administration.¹ And the local statute may apply in general terms to those who die without the State, leaving property within the same to be administered upon, whether the deceased were alien or citizen.²

§ 173. **Foreign Appointment of Executors or Administrators Unavailable in Domestic Jurisdiction; Local Letters required; Exceptions.**—The executor or administrator appointed in one State or country has, therefore, no right of control, as such, over property in another State or country. As to external assets, he cannot interfere. He has no power to collect debts or incorporeal personalty in such other State or country; nor to discharge them.³ He cannot control lands so situated.⁴ Nor can he be sued or defend a suit as executor or administrator in one State or country by reason of an appointment conferred in another.⁵ The well-settled rule is that administration operates of right only in the State or country where it was granted, and there may operate exclusively of all foreign appointment; and that, before one can be recognized in a jurisdiction as personal representative of the deceased, he must be clothed with the correspondent probate authority which the sovereignty of that jurisdiction is competent to confer.⁶

¹ *Isham v. Gibbons*, 1 Bradf. (N. Y.) 69; *Plummer v. Brandon*, 5 Ired. Eq. 190; *Willing v. Perot*, 5 Rawle, 264; *Woodruff v. Schultz*, 49 Iowa, 430.

² *Piquet*, Appellant, 5 Pick. 65.

³ *Supra*, § 164; U. S. Digest, 1st series, Executors & Administrators, 4432-4455; *Sanders v. Jones*, 8 Ired. Eq. 246; *People v. Peck*, 4 Ill. 118; *Pond v. Makepeace*, 2 Met. 114; *Beaman v. Elliot*, 10 Cush. 172; *Chapman v. Fish*, 6 Hill, 555; *McClure v. Bates*, 12 Iowa, 77; *Sabin v. Gilman*, 1 N. H. 193; *Cockleton v. Davidson*, 1 Brev. 15; *Doe v. McFarland*, 9 Cranch, 151; *Kerr v. Moon*, 9 Wheat. 566; *Mansfield v. Turpin*, 32 Ga. 260; *Union Mutual Life Ins. Co. v. Lewis*, 97 U. S. Supr. 682.

⁴ *Apperson v. Bolton*, 29 Ark. 418; *Sheldon v. Rice*, 30 Mich. 296.

⁵ *Allsup v. Allsup*, 10 Yerg. 283; *Curle v. Moore*, 1 Dana, 445; *Winter v. Winter*, 1 Miss. (Walk.) 211; *Vermilya v. Beatty*, 6 Barb. 429; *Norton v. Palmer*, 7 Cush. 523; *Kerr v. Moon*, 9 Wheat. 565; *Hedenberg v. Hedenberg*, 46 Conn. 30. A court of chancery cannot decree against a foreign administrator as such. *Sparks v. White*, 7 Humph. 86.

⁶ *Turner v. Linam*, 55 Ga. 253; *Bells v. Nichols*, 38 Ala. 678; *Kansas Pacific R. v. Cutler*, 16 Kan. 568; *Moore v. Fields*, 42 Penn. St. 467; *Price v. Morris*, 5 McLean, 4; *Naylor v. Moody*, 2 Blackf. 247; *Rockham v. Wittkowski*, 64 N. C. 464. As to the running of limitations

To this rule, however, are exceptions, grounded in comity or favor. Some American States permit a foreign executor or administrator qualified abroad to sue for local assets belonging to the estate of the deceased, without qualifying under a local probate appointment; which permission, however, being in derogation of sovereign right, the statutes which prescribe the terms of such suits, as by record, or otherwise, must be strictly followed. If qualified locally according to the laws of that particular State, by probate appointment or otherwise, he may sue and collect, of course.¹ So have statutes permitted the non-resident executor or administrator to defend local suits on similar terms;² or made him subject to suits by attachment.³ Foreign representatives, by virtue of the property belonging either to the estate, or to themselves, or their own place of local residence, are sometimes made amenable in equity courts of the local jurisdiction, as we shall see hereafter, for fraudulent conduct and delinquency in their trust, or intermeddling; a principle which runs deep in chancery practice.⁴ And local statutes enable foreign executors or administrators to sell or deal with real estate in the local situs for due administration purposes, or to transfer local stock, or to perform various other specified acts in the local jurisdiction.⁵

The executor or administrator appointed in another State has been permitted to maintain an action on a judgment

against such foreign appointee, see *Bells v. Nichols*, *supra*. A State administration granted upon *bona notabilia* may enable the administrator to recover assets in the District of Columbia. *Blydenburgh v. Lowry*, 4 Cranch, C. C. 368. But the appointee of the District has the usual immunities. *Vaughan v. Northup*, 15 Pet. 1. The foreign appointee on the estate of a domiciled citizen is not likely to be recognized in the domiciliary jurisdiction as having the right to sue or collect. *Southwestern R. v. Paulk*, 24 Ga. 356.

¹ *Hobart v. Connecticut Turnpike Co.*, 15 Conn. 145; *Crawford v. Graves*, 15 La. Ann. 243; *Naylor v. Moffatt*, 29 Mo. 126; *Banta v. Moore*, 15 N. J. Eq. 97.

² *Moss v. Rowland*, 3 Bush, 505.

³ *Cady v. Bard*, 21 Kan. 667.

⁴ See *Montalvan v. Clover*, 32 Barb. 190; *Evans v. Tatem*, 9 S. & R. 252; *Field v. Gibson*, 56 How. (N. Y.) Pr. 232; *Colbert v. Daniel*, 32 Ala. 314; *Patton v. Overton*, 8 Humph. 192; *Tunstall v. Pollard*, 11 Leigh, 1; *Powell v. Stratton*, 11 Gratt. 792. The rule of charging a foreign executor who has not taken out local letters is not uniformly asserted, and gives rise to various opinions. See *Story Confl. Laws*, § 514 b, and notes.

⁵ See *Williams v. Penn. R.*, 9 Phila. (Pa.) 298; local codes; rights of executors, etc., as to real estate, *post*.

there recovered, on the ground that such suit need not be brought in the official character.¹ Also, by indorsement or without it, as the case may require, to enable his assignee or transferee to sue on a negotiable instrument in another State, although he might not have sued directly upon it as a representative of the deceased;² and, indeed, one might, in his own name, sue on a negotiable instrument payable to bearer, its production in the local court affording *prima facie* evidence of the right to sue and collect.³ The right of a foreign executor or administrator to assign or indorse in such capacity, so as to confer a right to sue in the local court, has, however, been questioned.⁴ Upon a contract made with himself, as executor or administrator, a foreign executor or administrator may sue.⁵

§ 174. **Principal and Ancillary Letters; Comity as to transmitting Assets for Distribution, after Local Debts are satisfied.**—The estate of a deceased person is, substantially, one estate, and in this sense the residuary legatees or distributees are interested in it as a whole, even though it be spread through various jurisdictions; while, as a rule, each administration must be settled, so to speak, in the jurisdiction where it was granted. When any surplus remains in the hands of a foreign or ancillary appointee, after paying all debts in that jurisdiction, the foreign court will, in a spirit of comity and as a matter of judicial discretion, order it to be paid over to the domiciliary executor or administrator, if there be one, instead of making distribution;⁶ in which case, the fund is applicable to debts, legacies, and expenses at the principal jurisdiction, as well as to distribution.⁷ The rule to thus

¹ Talmage v. Chapel, 16 Mass. 71; Barton v. Higgins, 41 Md. 539; Young v. O'Neal, 3 Sneed. 55; Slaughter v. Chenoweth, 7 Ind. 211; Trecothick v. Austin, 4 Mason, 16; Biddle v. Wilkins, 1 Pet. 686.

² Petersen v. Chemical Bank, 32 N. Y. 21; Leake v. Gilchrist, 2 Dev. L. 73. Bond and mortgage may be thus assigned so as to confer right to foreclose. Smith v. Tiffany, 16 Hun, 562.

³ Barrett v. Barrett, 8 Greenl. 353.

⁴ Stearns v. Burnham, 5 Greenl. 261; Thompson v. Wilson, 2 N. H. 291.

⁵ Lawrence v. Lawrence, 3 Barb. Ch. 71; Barrett v. Barrett, 8 Greenl. 346; Du Val v. Marshall, 30 Ark. 230; Trotter v. White, 10 Sm. & M. 607; Story Conf. Laws, §§ 513, 516, 517.

⁶ Wright v. Phillips, 56 Ala. 69.

⁷ Such transmission is natural and proper where it appears that no debts

pay over is not, however, absolute; on the contrary, the transfer will not be made if deemed, under the circumstances, improper;¹ and legislative policy is to secure the rights of its creditors and citizens at all hazards. The legal personal representative constituted by the forum of the domicile of a deceased intestate is usually the person entitled to receive and give receipts for the net residue of his personal estate obtained in any country.² And to such legal representative claimants who are not creditors of the estate, and especially residuaries and distributees, should report.³ Distribution of the estate, and the rights of legatees and of the surviving husband or widow, affecting the surplus, should be regulated by the law of the domicile of the testator or intestate, at the time of his decease.⁴

But as to the payment of local debts out of the local assets, the law of the place under which an ancillary administration is taken, must govern;⁵ and the satisfaction of local creditors, in full or *pro rata*, according as the general solvency or insolvency of the estate may require, or the local statute prescribes, is incumbent upon the ancillary administrator, before he remits the balance to the foreign executor or administrator.⁶ For the spirit of comity does not require

were owing in the ancillary jurisdiction. *Wright v. Gilbert*, 51 Md. 146. Where a foreign distributee is an infant, this is preferable to ordering payment to his "foreign guardian." *Twimble v. Dziedzyki*, 57 How. (N. Y.) Pr. 208. See also *Wms. Exrs.* 1664, and *Perkins's* note; *Story Conf. Laws*, § 513; *Low v. Bartlett*, 8 Allen, 259; *Mackey v. Coxe*, 18 How. (U. S.) 100.

¹ *Williams v. Williams*, 5 Md. 467; *Lawrence v. Kitteridge*, 21 Conn. 577; *Gilchrist v. Cannon*, 1 Coldw. 581; *Porter v. Heydock*, 6 Vt. 374; *Fretwell v. Lemore*, 52 Ala. 124; *Harvey v. Richards*, 1 Mason, 381. As between different States, assets will be more readily transmitted in avoidance of claimants of the residue, *semble*, than where the domiciliary jurisdiction was a foreign one. *Aspden v. Nixon*, 4 How. 467.

And if doubts arise as to the genuineness of foreign claims to the residue, as against domestic distributees or the State itself, this might furnish reason for holding back the fund for inquiry.

² *Eames v. Hacon*, 50 L. J. Ch. 740.

³ *Brown v. Brown*, 1 Barb. Ch. 189; *Richards v. Dutch*, 8 Mass. 506; *Campbell v. Sheldon*, 13 Pick. 23.

⁴ *Churchill v. Prescott*, 3 Bradf. (N. Y.) 233; *Ordronaux v. Helie*, 3 Sandf. Ch. 512; *Goodall v. Marshall*, 11 N. H. 88; *Jones v. Gerock*, 6 Jones (N. C.) Eq. 190; *Tucker v. Candy*, 10 Rich. Eq. 12.

⁵ *Ib.* And see *Wms. Exrs.* 1664 and *Perkins's* note.

⁶ *Davis v. Estey*, 8 Pick. 475; *Mitchell v. Cox*, 22 Ga. 32; *Normand v. Grogard*, 14 N. J. L. 425.

that citizens shall be put to the inconvenience and expense of proving and collecting their claims abroad when there are assets at hand, and that local rules for distributing an insolvent's estate shall yield to foreign; nor, on the other hand, can it approve of the absorption of local assets by local creditors, to the prejudice of creditors at the domicile; but what it asks is, that the local estate shall, as far as practicable, be so disposed of that all creditors of the deceased, in whatever jurisdiction, shall receive their proportional share, if the estate be insufficient to pay them in full.¹

Not only does the place where letters are locally granted govern as to the local grant of letters and the rules for settlement of local debts, but the accountability of an administrator for all assets received in one State or country, and all questions as to the faithful or unfaithful discharge of his duties, are rightfully decided by the laws, solely, of the State or country where he is appointed.²

§ 175. **Duty of the Domestic Representative as to Foreign Assets.** — The earlier rule frequently asserted in England in one loose form or another, is that assets in any part of the world shall be assets for which the domestic executor or administrator is chargeable; the practical effect being to enjoin upon the principal personal representative the duty of procuring, so far as foreign law and the peculiar circumstances will permit, personal assets wherever situated; realizing the bulk of the estate of his decedent as best he may, gathering in the property as one who represents the whole fortune, and having gathered it, account to those interested accordingly.³ Some of the judicial expressions on this point, to be sure, import too onerous a responsibility on the representative's part; and Mr. Justice Story has pointed out the fallacy of holding a domestic executor or administrator an-

¹ *Ib.*

² *Partington v. Attorney-General*, L. R. 8 H. L. 100, 119; *Fay v. Haven*, 3 Met. 109; *Hooper v. Olmstead*, 6 Pick. 481; *Heydock's Appeal*, 7 N. H. 496; *Lawrence v. Elmendorf*, 5 Barb. 73; *McGehee v. Polk*, 24 Ga. 406; *Ken-*

nedy v. Kennedy, 8 Ala. 391; *Marrion v. Titsworth*, 18 B. Mon. 582.

³ *Touchst.* 496; *Wms. Exrs.* 1661, 1662; *Attorney-General v. Dimond*, 1 Cr. & Jerv. 157; *Attorney-General v. Bouwens*, 4 M. & W. 171, 192.

swerable for foreign property which it is admitted that he can neither collect nor sue upon, nor compel its payment or delivery to himself by virtue of his domestic appointment;¹ foreign property, we may add, of whose existence, or of the grant of foreign administration for realizing it as assets, he may be quite unaware.¹

And yet, to let external assets knowingly escape his control, and be lost to the estate, when with reasonable diligence they might have been procured, seems a plain dereliction of duty in the principal or domiciliary representative; whose function, as rightly understood, is to grasp the whole fortune, as the decedent did during his life, save so far as the obstructive law of foreign *situs* or the limitations of his own appointment may restrain him. If, therefore, assets cannot be collected and realized for the benefit of the estate, without a foreign ancillary appointment, the executor or administrator of the decedent's last domicile ought, so far as may be consistent with his information, the means of the estate at his disposal and the exercise of a sound discretion, see that foreign letters are taken out and that those assets are collected and realized, and the surplus transmitted to him. If, as frequently happens, the domestic representative may collect and realize such property in the domestic jurisdiction, as by selling negotiable bonds, bills, notes or other securities, payable abroad; or by delivering bills of lading or other documents of title, indorsing or assigning by acts of his own which would be recognized as conferring the substantial title in such foreign jurisdiction, or otherwise by effectually transferring property of a chattel nature, situated or payable elsewhere, which is capable, nevertheless, of being transferred by acts done in the domestic jurisdiction, he should be held accountable for due diligence as to such net assets.² And so, too, if he may enforce the demand against the debtor, without resort to the foreign jurisdiction.³ If, however,

¹ Story Conf. Laws, § 514 *a*, commenting upon Dowdale's case, Cro. Jac. 55, 6 Co. 47 *b*.

² Attorney-General *v.* Bouwens, 4 M. & W. 171, 192, *per* Lord Abinger; Tre-

cothick *v.* Austin, 4 Mason, 33; Hutchins *v.* State Bank, 12 Met. 421; Butler, Estate of, 38 N. Y. 397.

³ As where the principal representative holds the evidence of the demand

foreign letters and an ancillary appointment at the *situs* be needful or prudent, in order to make title, and to collect and realize such assets, the principal representative should perform the ancillary trust or have another perform it, observing due diligence and fidelity, according as the laws of the foreign jurisdiction may permit of such a course; and if, in accordance with those foreign laws, a surplus be transmitted to the principal and domiciliary representative, or otherwise transferred, so as to be held by him in such capacity for payment and distribution, he will become liable for it, accordingly.¹

Whether, then, the principal or domiciliary representative be required *pro forma* or not, to include in his inventory assets which come to his knowledge, either situate in the State or country of principal and domiciliary jurisdiction, or out of it, his liability, as to assets of the latter sort, depends somewhat upon his means of procuring them, and the fact of an ancillary administration in the *situs* of such assets.² In any case he is bound to take reasonable means, under the circumstances, for collecting and realizing the assets out of his jurisdiction; nor is his liability a fixed, absolute one, but dependent upon his conduct; and it is getting the foreign assets into his active control that makes a domestic representative chargeable as for the property or its proceeds, rather than upon the duty of pursuing and recovering such assets.³

If assets situated in another jurisdiction come into the possession of the executor or administrator in the domiciliary jurisdiction, by a voluntary payment or delivery to him, without administration there, it follows that he should account for them in the domiciliary jurisdiction whose letters were the recognized credentials in the case.⁴ And it is held in several American cases, consistently with this rule, that, no conflicting grant of authority appearing, the domiciliary

or the document of title, and finds the debtor or his property within the jurisdiction of the appointment. *Merrill v. N. E. Mut. Life Ins. Co.*, 103 Mass. 245.

¹ *Attorney-General v. Dimond*, 1 Cr. & Jerv. 370; *Ewin, In re*, 11 Cr. & Jerv. 157; *Wms. Exrs.* 1661; *Jennison v. Hapgood*, 10 Pick. 78; *Clark v. Black-*

ington, 110 Mass. 372; *Stokely's Estate*, 19 Penn. St. 476.

² See *Schultz v. Pulver*, 11 Wend. 363; *Butler, Estate of*, 38 N. Y. 397.

³ See *Wms. Exrs.* 1664, and *Perkins's* note.

⁴ *Van Bokkelen v. Cook*, 5 Sawyer, C. C. 587.

appointee of another State may take charge of and control personal property of the deceased in the State of its *situs*.¹

§ 176. **Voluntary Surrender of Assets in Local Jurisdiction to Domiciliary Administrator.** — The powers of a representative being referable to the laws of the country or State from which he derives his authority, a foreign executor or administrator can only collect assets in another jurisdiction by virtue of a legislative or sovereign permission. Such legislative permission is accorded on various terms; and the terms of such permission must be complied with.² We have seen that the representative is usually confined, in suits for the recovery of assets, to the territorial jurisdiction of his appointment, and, subject to an ancillary appointment, to procuring the residuum, after satisfying the claims and rights of residents in the ancillary jurisdiction.³ But may not the title and authority of a foreign domiciliary representative be voluntarily recognized and debts paid him, or other assets voluntarily surrendered to him there? The doctrine of the English courts is, that such payment or surrender affords no protection against the claim of a domestic administrator.⁴ A preference for the English doctrine seems to be expressed in Justice Story's treatise, though he had judicially affirmed the contrary in a circuit decision.⁵ The Supreme Court of the United States, however, has maintained the validity of such payments or delivery of the assets, as between different States, so as to discharge the local debtor or possessor; and the general current of American authority supports this doctrine; there being, it is assumed, when such payment or delivery was made, no local administration.⁶ But this rule

¹ *Vroom v. Van Horn*, 10 Paige, 549; *Parsons v. Lyman*, 20 N. Y. 103; *Barnes v. Brashear*, 2 B. Mon. 380; *Denny v. Faulkner*, 22 Kan. 89.

² *Harrison v. Mahorner*, 14 Ala. 843; *supra*, § 173.

³ *Supra*, § 174. Wherever the title to the corporeal thing, or incorporeal right owned by the decedent, becomes so perfected in the representative under the foreign administration, that a local

and domestic appointment would be inappropriate, he should be permitted to procure or sue, as it seems, without a local appointment. *Purple v. Whithed*, 49 Vt. 187.

⁴ Whart. Conf. Laws, § 626; *supra*, § 172. See *Eames v. Hacon*, 50 L. J. Ch. 740.

⁵ Story Conf. Laws, § 515 a; *Trecothick v. Austin*, 4 Mason, 16.

⁶ *Mackey v. Cox*, 18 How. 104;

cannot be upheld, to the extent of violating the local law of the jurisdiction where the assets lie; and each State or country has the right to enlarge or limit the privilege and to prescribe the terms upon which it shall be conceded, or to deny it altogether.¹

Wherever the domiciliary executor or administrator may procure assets of the deceased from the local jurisdiction, without being obstructed by local claimants upon the estate, or a local executor or administrator, and without having to invoke the aid of the local courts, his rights are favorably regarded in many of the later decisions. For, if local claims are satisfied out of the estate, the local sovereignty can rarely complain.

§ 177. **Liability of Representative in Domestic Jurisdiction for Acts done Abroad.** — How far executors or administrators are liable in a domestic jurisdiction for acts abroad, does not appear to be clearly settled; and different States or countries may be expected to uphold their own legislative policy in preference to external systems. Beyond what has been already stated as to holding a domestic representative responsible for assets received from abroad, and requiring a principal representative to pursue assets in an ancillary jurisdiction, it would appear that a legal liability upon one's domestic statutory bond should be construed somewhat strictly with reference to the statute in question.² But one may be charged in equity, as trustee, for the misapplication of funds received from abroad. And in some States it is held that, if foreign executors or administrators come within

Hutchins v. State Bank, 12 Met. 425; Wilkins v. Ellett, 9 Wall. 741; Parsons v. Lyman, 20 N. Y. 103; Abbott v. Miller, 10 Mo. 141; Whart. Conf. Laws, § 626; Hatchett v. Berney, 65 Ala. 39, *per* Brickell, C. J.; Citizens' Bank v. Sharp, 53 Md. 521.

¹ *Ib.* Perhaps this doctrine of voluntary recognition is especially to be favored where payment or delivery was made to the domiciliary executor under

a probated will. See Shaw, C. J., in Pond v. Makepeace, 2 Met. 114. Where a debtor makes payment of a naked debt to the principal administrator of his foreign creditor, he may be compelled to pay it again to a domestic representative subsequently appointed, and suing for it in the debtor's own jurisdiction. Young v. O'Neil, 3 Sneed, 55. *Cf.* Mackey v. Cox, *supra*.

² Cabanne v. Skinker, 56 Mo. 357.

the jurisdictional limits of the State, they are liable to be held by creditors or to be brought to account by legatees or distributees;¹ while in other States the rule appears to be, that the representative cannot be sued elsewhere, even on a judgment rendered against him in the State of his appointment, or, at all events, if charged in his representative character, and not *de bonis propriis*.²

§ 178. **Permitting Foreign Creditors to sue in the Local Jurisdiction.** — Upon reciprocal terms, foreign creditors are sometimes permitted to come into the domestic jurisdiction and prosecute their claims against the local assets; not, however, in such a way as to gain an advantage over domestic creditors; and, in general, they may fairly be required to exhaust the foreign assets before attempting to have domestic assets subjected to their claims.³

But a judgment against one, in his character of executor or administrator, is not usually entitled to operate in another State with greater extent or force than in the State where it was recovered.⁴ And where a demand against the estate of a deceased non-resident is barred by the laws of the State where he was domiciled at the time of his death, it is equally barred in another State.⁵

The attempt of a domiciliary creditor, who cannot prosecute his claim in the jurisdiction of last domicile, to enforce that claim upon assets, by procuring letters in another jurisdiction, is not to be countenanced; and letters procured by him, on the allegation that he is a creditor, are improperly obtained.⁶

¹ *Johnson v. Jackson*, 55 Ga. 326; *Swearingen v. Pendleton*, 4 S. & R. 389; *Gulick v. Gulick*, 33 Barb. 92. See this subject discussed with conflicting citations. *Story Conf. Laws*, § 514, *b*; *Wms. Exrs.* 362, 1929, and *Perkins's* notes.

² *Pond v. Makepeace*, 2 Met. 114; *Willard v. Hammond*, 21 N. H. 382; *Wms. Exrs.* 362, note by *Perkins*.

³ *Fellows v. Lewis*, 65 Ala. 343; *Morton v. Hatch*, 54 Mo. 408.

⁴ *Coates v. Mackey*, 56 Md. 416.

⁵ *Wernse v. Hall*, 101 Ill. 423.

⁶ *Wernse v. Hall*, 101 Ill. 423. If the circumstances of a case are such as would make it the duty of one domestic court to restrain a party from proceeding in another domestic court, they will also warrant it in imposing on him a similar restraint with regard to proceeding in a foreign court. But it is held in England that chancery is not warranted, even where an administration decree has been obtained, to restrain a foreign creditor from proceeding in a foreign

§ 179. **Principal and Ancillary Jurisdictions, how far Independent of One Another.** — It is held, in the Supreme Court of the United States, that different executors of the same testator, appointed by his will in different States, are in privity with each other, and bear the same responsibility to creditors of the testator as if there were only one executor; and hence, that a judgment against the executors in one State is evidence against those in another State.¹ But as to administrators, whose appointments are necessarily derived from different sovereign jurisdictions, there is no such privity; and, according to the universal American rule, where uncontrolled by local statute, so independent are different ancillary administrations of the principal administration and of each other, whether in case of testacy or intestacy, that property and assets received in the one forum cannot be sued for nor its application compelled in another, nor can a judgment obtained in one such jurisdiction furnish conclusive cause of action in another.²

But the forum of original administration is the forum in which the final account is to be made; and this forum, though treating the allowance of probate accounts in the ancillary jurisdiction as, for the most part, conclusive of items there so returned, sometimes reviews independently fundamental questions involving fraud and error in such ancillary administration, and affecting the distribution of the estate.³

court against the administrator. *Carron Iron Co. v. Maclaren*, 5 H. L. Cas. 416; *Crofton v. Crofton*, 29 W. R. 169. A judgment obtained, however, against the administrator by default in such proceedings would appear to be only *prima facie* evidence of the debt. *Crofton v. Crofton*, 29 W. R. 169.

¹ *Hill v. Tucker*, 13 How. 458; *Goodall v. Tucker*, ib. 469.

² Mr. Justice Wayne in *Hill v. Tucker*, *supra*; *Harvey v. Richards*, 1 Mason, 415, *per* Mr. Justice Story; *Taylor v. Barron*, 35 N. H. 484; *Wms. Exrs.* 363, and *Perkins's ex.*; *King v. Clarke*, 2 Hill (S. C.) Ch. 611; 2 Kent. Com. 434; *Fay v. Haven*, 3 Met. 109, and

cases cited; *Hedenberg v. Hedenberg*, 46 Conn. 30; *Magraw v. Irwin*, 87 Penn. St. 139. But as to foreign judgment, see *Barton v. Higgins*, 41 Md. 539; *Talmage v. Chapel*, 16 Mass. 71. The possession of land by the local administrator for local administration cannot be disturbed by the foreign and domiciliary executor for the purpose of selling, until such local debts and administration charges are settled. *Apperson v. Bolton*, 29 Ark. 418; *Sheldon v. Rice*, 30 Mich. 296.

³ *Clark v. Blackington*, 110 Mass. 369; *Ela v. Edwards*, 13 Allen, 48; *Baldwin's Appeal*, 81 Penn. St. 441.

Foreign executors and administrators cannot merely by virtue of their offices either prosecute or defend actions in the courts of other States or countries.¹ The disability is, however, removed in some instances by local statute;² and in others by bringing part of the assets into the jurisdiction.³ And in the cases where the representative is not permitted to sue as such, in a foreign jurisdiction, it is usually found that the subject-matter of the suit is the subject of local administration within such foreign jurisdiction.⁴

§ 180. **Responsibility where the same Person is Principal and Ancillary Representative.**—The want of privity between different administrators in different States has been so much insisted upon in this country, that American authorities may be found, apparently to the effect that a person who is administrator of the same estate in different States, and who has received assets under both administrations, cannot be compelled to account for any such assets, except in the place where they were received.⁵ We apprehend that this is not entirely accurate, inasmuch as a point may be reached where the transfer of surplus assets from the ancillary to the principal administrator may be said to have actually taken place; and because, moreover, as we have shown, the principal is so far related to the ancillary administrator, meanwhile, that a certain duty exists of which he cannot divest himself, namely, to hold the latter to his trust of making a transfer in conformity with the local law. And in accordance with this latter view, it is ruled that where the administration, both at home and abroad, has been taken out by the same person, the presumption is that he has done his duty; and when he

¹ *Vaughan v. Northup*, 15 Pet. 1; *Noonan v. Bradley*, 9 Wall. 394; *Story Confl. Laws*, § 513; *Wms. Exrs.* 1641.

² See § *post*.

³ *Supra*, § 25.

⁴ *Purple v. Whithed*, 49 Vt. 187; *Kilpatrick v. Bush*, 23 Miss. 199. Where an ancillary administration is had, the executor or administrator of the domicile cannot withdraw or dispose of the ancil-

lary assets, by direct or indirect means, until the ancillary administration is settled, whether debts are found in the ancillary jurisdiction or not. *Du Val v. Marshall*, 30 Ark. 230.

⁵ *Stacey v. Thrasher*, 6 How. 44; *Aspden v. Nixon*, 4 How. 467; commented upon in *Story Confl. Laws*, § 529, *b*.

comes to settle his account in the State where distribution is to be made, he cannot deny that he has received what the foreign administrator, if he had been a different person, would have been compelled to pay, and what he would have been bound in duty to demand and get.¹ And the rational rule is that, the full and final settlement being made in the jurisdiction of last domicile, the principal representative must be held to account in the domiciliary jurisdiction for the whole of the personal property which has come to his hands, wherever found, or by whatever means collected; so that if he has a surplus in his hands arising out of the administration elsewhere, after paying the expenses of administration and discharging his own liabilities there, he becomes accountable for it in the domiciliary jurisdiction in the same manner as he would be if another had been appointed administrator and had paid over a balance.²

§ 181. **Ancillary or Local Representative, how far Responsible for Assets.** — Since the ancillary or local representative represents only the assets of his particular jurisdiction, he is not responsible for assets in other jurisdictions; nor in such capacity alone, and independently of some appointment conferred in the jurisdiction of the decedent's last domicile or residence, does it appear that he has any right to follow assets elsewhere. His duty is to apply the local assets as the local laws may have determined; paying local creditors, as such laws usually direct, and remitting the surplus as the local court may order. But even an ancillary and local administrator, who receives assets from some jurisdiction to which his authority did not extend, has no right to pervert them to his own use.³

¹ Black, C. J., in *Stokeley's Estate*, 19 Penn. St. 476, 482. And see *Baldwin's Appeal*, 81 Penn. St. 441.

² *Jennison v. Hapgood*, 10 Pick. 77, 100.

³ See *Baldwin's Appeal*, 81 Penn. St. 441; *Wms. Exrs.* 432; *Fay v. Haven*, 3 Met. 109; *Norton v. Palmer*, 7 Cush. 523. Local statutes may be found to

modify these rules. In some States there is no statutory provision for ancillary administrations as a distinct species; but administrations granted upon the estates of non-residents stand upon the same footing as other administrations. *Carr v. Lowe*, 7 Heisk. 84. See *Cureton v. Mills*, 13 S. C. 409.

An ancillary or local administrator has no authority, under the general limitations imposed by the rule of comity, to allow and pay claims of residents of the State or country where the principal administration was granted, especially where the claims originated abroad.¹

§ 182. **Where different Executors are named in a Will for different Sovereign Jurisdictions.**— We have seen that a testator may name one executor or set of executors for one State or country, and another for another State or country.² And if, in doing so, he confines their duties to their respective jurisdictions, the case is not one of principal and auxiliary appointments. The fact that the executor of one locality has the same right to control assets there that the executor of another locality has to control assets there, is hostile to the supposition that the executor of the last domicile shall be bound to charge himself with the assets abroad. The executor of last domicile may well demand that the assets be surrendered to him; but there his duty ends, provided he has not the means to compel the surrender of such assets.³

§ 183. **Where the Principal Representative cannot procure Foreign Assets, Legatees or Distributees may pursue.**— Where, by reason of the law in the jurisdiction of foreign administration, or otherwise, it appears impracticable for the domestic representative, appointed in the decedent's last domicile, to procure the control of the foreign assets or surplus of foreign administration, it remains for the legatees, by such procedure in the foreign jurisdiction as may be suitable, to obtain what belongs to them; and if the name of the domestic representative should be needful in such proceedings, the use of it may be granted upon proper terms.⁴

¹ Story Conf. Laws, §§ 334, 336, 337;
² Kent. Com. 434; *Shegogg v. Perkins*,
 34 Ark. 117, and cases cited in the
 opinion of the court; *supra*, § 15.

³ *Supra*, § 42.

⁴ *Sherman v. Page*, 85 N. Y. 123.

⁴ *Sherman v. Page*, 85 N. Y. 123,
 129.

CHAPTER VIII.

OFFICIATING WITHOUT AN APPOINTMENT.

§ 184. **Executor de son Tort at Common Law defined.** — English ecclesiastical law has long applied an official name to an unofficial character; styling as executor *de son tort* (or executor of his own wrong) whoever should officiously intermeddle with the personal property or affairs of a deceased person, having received no appointment thereto. This designation is not apt, since it applies the term “executor” as well to intestate as to testate estates, and signifies, moreover, that the person who intruded his services had no legal authority in any sense. But courts have not clearly discriminated in the definition.¹ In several American States the title executor *de son tort* is now simply repudiated;² and yet one’s exercise of functions which properly pertain to administration without proper credentials, may, by whatever name we call it, be brought to the attention of legal tribunals in any age or country.

¹ Wms. Exrs. 257; Bennett v. Ives, 30 Conn. 329; Wilson v. Hudson, 4 Harr. 168; Barron v. Burney, 38 Ga. 264; Brown v. Durbin, 5 J. J. Marsh. 170; White v. Mann, 26 Me. 361; Leach v. Pittsburg, 15 N. H. 137; Emery v. Berry, 8 Fost. 473; Scoville v. Post, 3 Edw. (N. Y.) 203; Hubble v. Fogartie, 3 Rich. 413. Williams observes (Wms. Exrs. 7th ed. 257, *v*) that the definition of an executor *de son tort* by Swinburne, Godolphin, and Wentworth, is in the same words; viz.: “He who takes upon himself the office of executor by intrusion, not being so constituted by the deceased, nor, for want of such constitution, substituted by the [ecclesiastical] court to administer.” Swinb. pt. 4, § 23, pl. 1; Godolph. pt. 2, c. 8, § 1; Wentw. Off. Ex. c. 14, p. 320, 14th ed. “But,” adds Williams,

“the term is, in the older books, sometimes applied to a lawful executor who mal-administers; as by the Lord Dyer in Stokes v. Porter, Dyer, 167 *a*.” All this might seem to intimate that the stigma was originally applied with exclusive regard to estates where the deceased person had left a will. But the modern cases above cited make it clear that the significance of executor *de son tort* is not so confined in modern practice; for the rule now is that a party intermeddling with the estate of a deceased person, and doing acts which an executor or administrator alone may do, will make himself liable as executor *de son tort*.

² Field v. Gibson, 20 Hun (N. Y.) 274; Fox v. Van Norman, 11 Kan. 214; Ansley v. Baker, 14 Tex. 607; Barasien v. Odum, 17 Ark. 122.

§ 185. **Various Circumstances under which one may act without having been qualified.** — It is obvious that one who performs acts which only a qualified executor or administrator could have properly performed, may act either as a wrongdoer, utterly without authority, or instead, in perfect good faith, as having a colorable right and perhaps expecting the appointment; that the acts performed may be injurious to the estate, and obstructive of those lawfully entitled to its control, on the one hand, or, on the other, beneficial and fairly designed for its protection pending the selection and qualification of a legal representative. While, moreover, some person who, as conditions develop, cannot receive probate credentials from the court, may, under one or another of such aspects, occupy a certain unofficial relation towards the estate of the deceased, the suitable executor named in the last will, or, if there be no will, the surviving husband, widow, or next of kin qualified to administer may, and almost of necessity must, before qualification, perform certain acts when death stops short the machinery of an individual's affairs; acts which of themselves cannot be regarded perhaps as authorized in advance by any tribunal, and yet are appropriate to the emergency; acts which letters subsequently granted should suffice to protect. Besides this, there are certain duties connected with supervising the funeral and burial, and involving expense to the estate, which may fitly devolve upon one's immediate relatives, rather than upon any executor or administrator at all, and which are usually performed, in fact, before any examination of the papers of the deceased serves to disclose what last will, if any, was left behind, how large was the estate, or who shall rightfully settle the affairs of the deceased.

According to the different aspects above suggested, our modern law pronounces differently; as it would seem, upon acts performed with reference to the estate of a deceased person by one who at the time had not been legally appointed and qualified to administer. These differing aspects we shall endeavor to consider apart.

§ 186. **Wrongful and Injurious Dealings with a Dead Person's Estate; Executor de son Tort.** — It is the wrongful or tortious intermeddler, without claim or the color of a title, upon whom sound authorities in law fasten, in effect, the liabilities of executor *de son tort*, whether that stigma be applied to the intruder or not.¹ The old books cite, however, many examples *in terrorem*, to show that the slightest misappropriation of the goods and chattels of a deceased person will constitute an executorship *de son tort*, unless one was a real executor or administrator; as, for instance, taking a bible or a bedstead; or appropriating goods to one's own debt or legacy; and even the widow of the deceased came within this category, it was said, if she milked the cows, or took more apparel than she was entitled to.² Wherever one killed the cattle, consumed, wasted, or destroyed goods and effects of the deceased, or sold, gave away, or loaned what belonged to the dead person's estate, he became an executor *de son tort*. Living in the house, and carrying on the trade of the deceased, was held an intermeddling in the same sense;³ so, too, paying debts or charges on account of the deceased, unless the payment was made with one's own money;⁴ also demanding, collecting, and giving acquittances for debts due the estate of the deceased.⁵ All such dealings being tortious in theory, one's agent or servant who meddled knowingly with the assets of a deceased person might be treated as executor *de son tort*, as well as his unqualified principal or master.⁶ Creditors, too, who participated in the wrong collusively with the widow or kindred, have been held thus liable.⁷

¹ See *Smith v. Porter*, 35 Me. 287; *Ward v. Bevill*, 10 Ala. 197; *Claussen v. Lufreuz*, 4 Green (Iowa) 224; *Flemings v. Jarrat*, 1 Esp. 336.

² *Wms. Exrs.* 257, 258; *Noy*, 69; *Godolph.* pt. 2, c. 8, § 4; *Dyer*, 166 *b*. It seems absurd that the milking of cows by a widow or another having their custody should expose one to the liabilities of an executorship *de son tort*. Milking is needful for the health of such creatures; and as for so perishable a commodity as milk, it is for the best

interest of an estate that it should be sold or appropriated at once, account being duly made afterwards for the proceeds to the representative duly appointed.

³ *Hooper v. Summersett, Wight*, 16; *Wms. Exrs.* 259.

⁴ *Carter v. Robbins*, 8 Rich. 29.

⁵ *Godolph.* pt. 2, c. 8, § 1; *Wms. Exrs.* 259.

⁶ *Sharland v. Mildon*, 5 Hare, 468; *Turner v. Child*, 1 Dev. L. 331.

⁷ *Mitchell v. Kirk*, 3 Sneed, 319.

Where a person deceased gave his property to the person in whose house he died, it was held that the donee, by receiving and using the property, became an executor *de son tort*.¹ And generally one who holds property of a deceased person under color of some gift or value from him in fraud of the deceased person's creditors, may be sued in that capacity.² So, too, a widow who continues, understandingly, in possession of her deceased husband's goods, and used them as her own.³

But acts performed towards one's property, by virtue of an agency whose revocation by death has not been brought home to the agent, will not constitute an executorship *de son tort*. As where a man left home, having placed money in the hands of his wife, who used it in paying his debts and providing the needs of the family, before she received knowledge that he had died abroad.⁴ A voluntary conveyance of property, which is disposed of during the donor's lifetime, cannot be made the ground of a suit against the donee as executor *de son tort*;⁵ nor can transfers, by way of security or otherwise, which were made by the deceased during his life, and are unimpeachable as in fraud of his creditors.⁶ One who takes, by purchase or otherwise, property of the deceased, shall not, unless in collusion with the intermeddler, be chargeable as executor *de son tort*, but the intermeddler shall be charged alone.⁷ In modern times, too, the innocent custodian or bailee is sheltered by the law; thus, one who

¹ Gleaton v. Lewis, 24 Ga. 209.

² Edwards v. Harben, 2 T. R. 587; Alexander v. Kelso, 57 Tenn. 5; Wms. Exrs. 261; Allen v. Kimball, 15 Me. 116; Norfleet v. Riddick, 3 Dev. L. 221; Tucker v. Williams, Dudley (S. C.) 329; Hopkins v. Towns, 4 B. Mon. 124; Simonton v. McLane, 25 Ala. 353. And see 43 Eliz. c. 8, cited Wms. Exrs. 260. Cf. Barnard v. Gregory, 3 Dev. 223. Fraudulent transfers by the testate or intestate are open to attack in the due course of settling the estate, Bowdoin v. Holland, 10 Cush. 17; Norfleet v. Riddick, 3 Dev. 221.

³ Hawkins v. Johnson, 4 Blackf. (Ind.) 21; Madison v. Shockley, 41 Iowa, 451. And see as to a surviving husband, Phaelon v. Houseal, 2 McCord Ch. 423.

⁴ Brown v. Benight, 3 Blackf. 39. See also Outlaw v. Farmer, 71 N. C. 31.

⁵ Morrill v. Morrill, 13 Me. 415.

⁶ O'Reily v. Hendricks, 2 Sm. & M. 388; Garner v. Lyles, 35 Miss. 176. Equity has jurisdiction of a bill by the creditor under such circumstances. Ib.

⁷ Paull v. Simpson, 9 Q. B. 365; Wms. Exrs. 263; Smith v. Porter, 35 Me. 287.

holds the goods of a deceased person, under some colorable claim, as that of a lien, or by reason of some mistake, has been pronounced no executor *de son tort* at all;¹ and where one happens to be left in charge of a dead person's goods (as in case the death occurred at his house), he may keep them until he can lawfully discharge himself without incurring the responsibilities of such an executorship.² One may, under the circumstances presented, become the temporary bailee of a dead man's goods, to carry them home, with powers and responsibilities regulated accordingly.³

§ 187. *Executorship de son Tort; Legal Consequences.* — The legal consequence of becoming what was styled an executor *de son tort*, was to render one's self liable, not only to an action by the rightful executor or administrator, but also, so as to be sued as executor by a creditor of the deceased, or by a legatee;⁴ for, as Lord Cottenham observes, an executor *de son tort* has all the liabilities, though none of the privileges, that belong to the character of executor.⁵ By the intermeddling of such a party, it was considered that creditors had been aggrieved. Of his liability to the rightful executor or administrator we shall speak presently; this liability to the creditor or legatee deserving our previous attention, as something quite abnormal, and exposing the intermeddler to penalties by no means apportioned to his particular offence.

Why a person who thus acts should be suable by third parties, as an executor, is, so the older text-writers affirm, because strangers may naturally conclude from such conduct that he has a will of the deceased which he has not yet proved.⁶ Yet such a supposition must, in many cases, be purely imaginary; the party who sued knowing perfectly

¹ *Flemings v. Jarrat*, 1 Esp. 336; *Wms. Exrs.* 263. And this even though one's claim of lien may not be positively established. for the proceeds, is not liable to the administrator afterwards appointed. *Perkins v. Ladd*, 144 Mass. 420.

² *Godolph.* pt. 2, c. 8; *Wms. Exrs.* 263. ⁴ *Wms. Exrs.* 265; *Bac. Abr. Executors* B, 3.

³ *Graves v. Page*, 17 Mo. 91. One who in good faith sells as the widow's agent perishable property, and accounts ⁵ *Carmichael v. Carmichael*, 1 Phill. Ch. 103.

⁶ 2 Bl. Com. 507, 508; *Wms. Exrs.* 265.

well, all the time, that the intermeddling was wrongful, or done for some other and inconsistent purpose. Upon such a fiction, however, the pleadings are conducted. If the person sued as executor *de son tort* should plead *ne unques executor*, and the creditor suing him joined issue, the judgment on proof of acts such as constitute in law an executorship *de son tort* would be that the plaintiff recover the debt and costs, to be levied out of the assets of the testator, if the defendant have so much; but if not, then out of the defendant's own goods.¹ And all this heavy responsibility incurred in law, to creditors, because of giving away the dog or bedstead of the deceased debtor; a penalty out of all proportion to the character of the offence, and with so little exercise of real discrimination, that the gross intermeddler might fare better than a custodian who had thoughtlessly, and not wilfully, disposed of what was likely to spoil before a lawful representative could intervene.² While, however, by sincerely denying that he was an executor, the incautious intermeddler might thus fall upon the thorns, it was open to him to escape the worst by taking the humor of the fiction, and alleging on his own part *plene administravit*; under which plea he was only chargeable for the assets which had actually come to his hands, and might relieve himself by showing payments made to other creditors of equal or superior degree, so as to have exhausted such assets, or a delivery of assets to the rightful executor or administrator before action brought.³ And by pleading both *ne unques*

¹ Wms. Exrs. 266; Cro. Jac. 648.

² In *Robinson v. Bell*, 2 Vern. 147, it is intimated that in cases of gross disproportion of this levy to the property meddled with, equity will relieve the executor *de son tort*; as where the widow of an ale-house keeper is thus sued for debts of the intestate on proof merely that she had taken money for a few pots of ale sold in the house after her husband's death. Modern precedents decidedly favorable on this point appear, however, to be wanting. Wms. Exrs. 266.

The English principles of pleading, where one is sued by creditors as executor *de son tort*, are recognized in some American cases, — mostly early ones. See *Campbell v. Booth*, 7 Cow. 64; *Hubble v. Fogartie*, 1 Hill (S. C.) 167. The doctrine is considerably upheld in North Carolina. *Morrison v. Smith*, Busb. L. 399; *Bailey v. Miller*, 5 Ire. 444. See *Riddle v. Hill*, 51 Ala. 224.

³ Wms. Exrs. 267; 1 Salk. 313. But payment made, *after* action brought, to the rightful administrator is not a good plea to the creditor's action. *Curtis v.*

executor and *plene administravit*, absurdly inconsistent as such pleas must have been, the intermeddler had a double means of escaping the perilous consequences of the creditor's suit.¹

§ 188. **Effect of Wrongful and Injurious Dealings, aside from the Theory of Executorship *de son tort*.**—Aside from all fictions of an executorship *de son tort*, the rational consequence of acting without authority in an estate must be, that the acts shall be judicially treated with reference to their injurious or beneficial character to the estate, as also to the situation and motives of the person whose conduct toward it is considered. The common-law pleadings, if carefully pursued, were not unfavorable to such a discrimination; and such a discrimination does a man of sense, unread in the law, draw when left, as any one may be, with assets of a dead person in his custody, which no one else for the moment has any legal right to demand of him. That he should be specially charged, and that to the extent of having to respond to creditors as well as to the lawful representative, that he should be stigmatized by any such title as executor *de son tort*, unless he had injuriously intermeddled, that the test should be, not whether he has dealt with prudent regard to the interests of others under the circumstances, but whether he has assumed official functions, is not likely to occur to him. And, accordingly, do we find the legislative policy of modern times tending to reject this antiquated theory of executorship *de son tort*, and defining one's liability, under circumstances like these, by rules more consonant to reason and justice. For,

Vernon, 3 T. R. 587; 2 H. Bl. 18; Morrison v. Smith, Busb. L. 399. Yet it is held that after action brought he may apply the assets in his hands to the payment of a superior debt, and plead accordingly. Oxenham v. Clapp, 2 B. & Ad. 309.

¹ Hooper v. Summersett, Wight, 20. An executor *de son tort* cannot set up in defence to the creditor's suit that he retained the property for his own debt; not even the rightful executor's or ad-

ministrator's assent will give such a plea validity. See Wms. Exrs. 269; Cro. Eliz. 630; Yelv. 137; Bull. N. P. 143; Curtis v. Vernon, 2 T. R. 587. The impolicy of allowing such a defence is the reason given for refusing it admission. Though it is otherwise if, *pendente lite*, he procures letters from the court; for this appears to warrant the inference that his previous acts were performed under color of right. See Wms. Exrs. 270; 2 Ventr. 180.

otherwise, it might be said that the common law preferred that the personalty of a deceased person should go to waste rather than let any one without regular authority take the responsibility of protecting it at a critical moment, even though that possession and responsibility had been thrust upon him without his agency. The acts, moreover, of one having the color of a title or a claim to administration, and like a widow, next of kin, legatee, or creditor, directly interested in preserving the estate, are, if so performed that the rightful allowance, share, legacy, or debt of the custodian may stand as indemnity for the transaction, treated with increasing indulgence, in contrast with those performed by some stranger who officiously intrudes.

§ 189. **Modern Statutes restrict the Liability of Intruder to Creditors and Strangers.**—Modern legislation is found, therefore, to reduce very considerably this common-law liability of the executor *de son tort*; employing, indeed, the old official title; but making such a person liable to the actions of creditors and other aggrieved, if liable to them at all, only for the property taken and to the extent of the actual damage caused by his acts;¹ or, perhaps, in some definite penal sum based upon the amount of the estate taken by him.² Creditors cannot be considered aggrieved, without regard to the legal priorities observed among them, in settling an estate; nor legatees, apart from the usual rule that the claims of creditors take precedence.³

¹ McKenzie v. Pendleton, 1 Bush. 164; Mitchel v. Lunt, 4 Mass. 654; Cook v. Sanders, 15 Rich. 63; Elder v. Littler, 15 Iowa, 65; Hill v. Henderson, 13 Sm. & M. 688; Stockton v. Wilson, 3 Penn. St. 130.

² Double the amount of the estate intermeddled with is fixed by a New Hampshire statute. Bellows v. Goodal, 32 N. H. 97. A party aggrieved within this statute is one who has a *status* in the courts as such at the time of bringing his action; and, if claiming to be a creditor, the defendant may challenge

his right to be considered such by setting up the statute of limitations, etc. Brown v. Leavitt, 26 N. H. 493. See also Spaulding v. Cook, 48 Vt. 145.

³ McConnell v. McConnell, 94 Ill. 295.

Where one died leaving no property but his wearing apparel, and his widow paid out of her own means the expenses of his last sickness and burial, and gave to his brother a suit of his clothes of less value than the amount thus paid out by her, it was held that she could not be held liable to a general creditor

§ 190. **Liability of Intruder upon the Estate to the Rightful Executor or Administrator.**—Modern inclination, and that particularly of American States, tends, moreover, to the natural doctrine of holding the intruder or officious intermeddler liable, according to the wrongful character of his acts, to the rightful executor or administrator upon the estate, and to him alone. Such a person must, according to the Massachusetts statute, for instance, respond to the rightful executor or administrator for the full value of the goods or effects of the deceased taken by him, and for all damages caused by his acts to the estate of the deceased; and he shall not be allowed to retain or deduct any part of the goods or effects, except for such funeral expenses, or debts of the deceased, or charges, as the rightful representative might have been compelled to pay.¹ A purchase from an executor *de son tort* confers no better title than that of the vendor;² subject to the usual exceptions in favor of the *bond fide* purchasers of negotiable instruments, for valuable consideration.³ But the executor *de son tort* is thus compelled to account with only the rightful personal representative; and that, according as he may have wrongfully and injuriously intermeddled with the estate, or the reverse.⁴

As a general rule, any one who assumes to dispose of personal property belonging to the estate of a deceased person may be held responsible to the rightful personal representative, in tort, as for a conversion of the property, whether such representative receive his appointment before or after the conversion.⁵ If thus sued, he may show, in mitigation

as executrix in her own wrong. *Taylor v. Moore*, 47 Conn. 278. And see *Goff v. Cook*, 73 Ind. 351; *Ferguson v. Barnes*, 58 Ind. 169.

¹ Mass. Gen. Stats. c. 94, § 15. And see *Hill v. Henderson*, 13 Sm. & M. 688; *Barasien v. Odum*, 17 Ark. 122. To take a collectible note, and lose, by negligence, the opportunity to collect, may render one chargeable to the legal administrator. *Root v. Geiger*, 97 Mass. 178.

² *Carpenter v. Going*, 20 Ala. 587.

³ As to the rights of a *bond fide* purchaser against all the world, except the legal representative, see *Woolfork v. Sullivan*, 23 Ala. 548.

⁴ That some American States expressly repudiate the theory of executor *de son tort*, while leaving those who intermeddle liable to the rightful representative, see *Ansley v. Baker*, 14 Tex. 607, and other cases cited *supra*, § 184.

⁵ *Manwell v. Briggs*, 17 Vt. 176; *Wms. Exrs.* 270. And so, where the intruder was a wife whose husband is

of damages, payments made by him such as the lawful executor or administrator would have been bound to make, and nothing beyond.¹ But, while the act of the intruder is itself tortious, as in selling, for instance, it may, nevertheless, be advantageous to the executor or administrator to waive the tort, and bring assumpsit for the proceeds; which he may accordingly do; and even for the tort the damages recoverable may be merely nominal.²

§. 191. **Intermeddling with Lands of the Deceased.**—No intermeddling with the lands of the deceased will charge a person as technical executor *de son tort*; for such interference, on general principles, is a wrong done to the heir or devisee.³ And the fact, that an executor *de son tort* does not collect the effects and pay the debts, will not justify creditors in levying on the real estate of the deceased; for the lands of the deceased are in no sense assets in the hands of an executor *de son tort*.⁴

liable for her acts as at the common law. *Shaw v. Hallihan*, 46 Vt. 389.

¹ *Tobey v. Miller*, 54 Me. 480; *Reagan v. Long*, 21 Ind. 264; *Saam v. Saam*, 4 Watts, 432; *Wms. Exrs.* 270, 271, and cases cited; *Dorsett v. Frith*, 25 Ga. 537; *Weeks v. Gibbs*, 9 Mass. 74. Application of assets to debts should be in due order of preference. *Gay v. Lemlé*, 32 Miss. 309. Whether, when sued in trover, one can show payment of debts to the value of goods not sold but still in his custody, see *Wms. Exrs.* 270, & n.; *Mountford v. Gibson*, 4 East. 447; *Woolley v. Clark*, 5 B. & Ald. 744; *Hardy v. Thomas*, 23 Miss. 544. Upon the subject of recouping damages, local rules of practice in corresponding cases must be considered, and general works like that of Sedgwick on that subject. For similar limitations under statute provision, see, e.g., *Mass. Gen. Stats. c. 94, § 15*, cited *supra*. It is to be understood that the right to recoup debts paid is affected by the solvency or insolvency of the estate. *Mountford v. Gibson*, 4 East. 453;

Wms. Exrs. 271; *Neal v. Baker*, 2 N. H. 477. It is recently held in Alabama, however, that one who has received and used assets of an intestate under circumstances constituting him an executor *de son tort*, may show, when called to account in equity by the rightful representative, that there are no outstanding debts, and that he has applied the assets for the use and benefit of the distributees, as they must have been applied in due course of administration. *Brown v. Walker*, 58 Ala. 310.

² *Upchurch v. Nosworthy*, 15 Ala. 705; 52 Penn. St. 370. A bill in equity by distributees against an intermeddler should make the rightful personal representative a party plaintiff or defendant. *Nease v. Capehart*, 8 W. Va. 95.

See further, *Ross v. Newman*, 26 Tex. 131; *Sellers v. Licht*, 21 Penn. St. 98.

³ *Mitchel v. Lunt*, 4 Mass. 654; *Kling v. Lyman*, 1 Root, 104; *Nass v. Van Swearingen*, 7 S. & R. 196.

⁴ *Parsons, C. J.*, in *Mitchel v. Lunt*, 4 Mass. 654.

§ 192. **Liability of One who administers under Void Letters, etc.** — Where one takes out letters under a void or voidable grant, as executor or administrator, it is said, sometimes, that he becomes executor or administrator *de son tort*.¹ That he shall be held answerable for his official acts committed *de facto*, to the same extent as if he had been rightfully appointed, and must make good all losses occasioned through maladministration, purging himself of blame, and rendering due account, we cannot doubt; but it does not appear that his *status* is that of the common-law executor *de son tort*, necessarily, under circumstances which impute to him no intentional wrong.²

§ 193. **Beneficial Dealings with a Dead Person's Estate by One not appointed.** — Upon the ancient theory of intermeddling, various acts, beneficial in their character, might be performed without exposing one to the perilous risk of an executor *de son tort*; though the discrimination made was a very cautious one. One might order a funeral suitable to the estate of the deceased, and defray the cost out of such estate or his own private means; or supply the young children of the deceased with necessaries; or feed his cattle, or make out an inventory, or lock up the effects; or move the property to some secure place; or carry or send it to his home and to lawful representatives; and, in general, take good care of it, according to the circumstances and its situation.³ All these were said to be "offices merely of kindness and charity,"⁴ or, one should say rather, beneficial acts and

¹ *Bradley v. Commonwealth*, 31 Penn. St. 522. And see *Damouth v. Klock*, 29 Mich. 290; 49 Ala. 137, 586.

² See *supra*, c. 6; Plowd. 82; Wms. Exrs. 272. A void administration fraudulently procured may render the administrator and his sureties liable. *Williams v. Kiernan*, 25 Hun (N. Y.) 355.

³ *Brown v. Sullivan*, 22 Ind. 359; Church, J., in *Bacon v. Parker*, 12 Conn. 212; *Graves v. Page*, 17 Mo. 91; Wms. Exrs. 262; Godolph. pt. 2, c. 8; Harri-

son *v. Rowley*, 4 Ves. 216. Receiving a debt due the estate, for the alleged purpose of providing the funeral, may or may not constitute one an executor *de son tort*, according as the assets so procured were reasonably small or unreasonably great for that purpose. *Camden v. Fletcher*, 4 M. & W. 378. And see *Taylor v. Moore*, 47 Conn. 278.

⁴ Swinb. pt. 2, § 23; Wms. Exrs. 262.

offices of decency and prudence, commendable though performed from less exalted motives.¹

Legal and proper acts done by an executor *de son tort*, moreover, are held good against the true representative of the estate, if the latter would have been bound to do likewise in the due course of administration; and the fair sale of goods, or payment of money out of the assets which the executor *de son tort* controlled, in order to discharge debts binding to their full extent upon the estate of the deceased, should not be needlessly disturbed by the true representative;² or, at all events, where the parties to the transaction appear to have acted in good faith, prudently, and honestly.³ Prudence is exacted not only from administrators and executors, but from custodians and other bailees; and diligence to keep the estate from loss is not only commendable in one who has a temporary charge, but a matter of duty.⁴

Again, the circumstance that a widow is left in possession of some goods of her deceased husband does not, as modern practice inclines, justify a ready inference of executorship *de son tort* on her part, with its penal obligations; especially if young children must be maintained by her;⁵ nor should the

¹ "It is clear that all lawful acts which an executor *de son tort* doth, are good." 5 Co. 30 b.

² 1 Ld. Raym. 661; Plowd. 282. The reason said is (Lord Holt, 1 Ld. Raym. 661) that the creditors are not bound to seek farther than him who acts as executor.

³ But see Mountford v. Gibson, 4 East. 441, as to solitary acts of wrong. Payments made in rightful course of administration, and properly chargeable upon the estate, may, we have seen, be set off by the executor *de son tort*. *Supra*, § 190. See Peters v. Leader, 47 L. J. Q. B. 573.

⁴ See Root v. Geiger, 97 Mass. 178; Graves v. Page, 17 Mo. 91; Schoul. Bailments, *passim*.

⁵ Chandler v. Davidson, 6 Blackf. 367; McCoy v. Paine, 68 Ind. 327; Crashin v. Baker, 8 Mo. 437. See Peters v. Leader, 47 L. J. Q. B. 573, a

late English case, where a widow, compelled to vacate premises, who moved some of the furniture and sold the rest at auction, was held to be no executrix *de son tort*, she duly accounting to the administrator afterwards. Nor was the auctioneer so liable. *Ib*.

Under the Georgia code, if one chargeable as executor *de son tort* dies, his administrator as such is chargeable to the same extent as the intestate; but by no technical construction does the latter become personally chargeable because of his own intestate's wrong. Alfriend v. Daniel, 48 Ga. 154. As to the effect of a widow's re-marriage, in making her husband an executor *de son tort*, technical wrong is not favored. Winn v. Slaughter, 5 Heisk. 191.

But parties who have assumed without authority to administer an estate, and claim to have administered fully, are estopped, when called upon, either in a

act of any other person or public official, vested with proper custody of a dead person's estate, pending the appointment and qualification of a legal representative. For this is very different from the taking of custody by an utter stranger, to the detriment of kindred and others immediately concerned.¹

§ 194. **Acts done by a Rightful Executor before qualifying.** —

It remains to consider the effect of acts done by the legal representative before he has been duly appointed and qualified. The old law inclined to treat executors and administrators differently in this respect. Upon an executor, the various preliminary acts which pertain to preserving the personal estate, like a prudent bailee, and (as it may happen, besides) ordering the funeral and meeting other emergencies of the situation, were thought to devolve most fitly; for courts of common law and equity looked chiefly to the title one derived from the testator's own selection; regarding probate and qualification in the ecclesiastical court as of secondary importance. All acts of this character performed by an executor were confirmed by his subsequent probate credentials; credentials which English courts have pronounced to be not the foundation but only authenticated evidence of the executor's title.² More than this, an executor, by sole virtue of the authority which his testator had conferred upon him, might proceed at once to do almost all the acts incident to his office, except to sue.³ He might seize and take any of

probate court or a court of equity, for an accounting, from denying their representative character, or their liability to account accordingly. *Damouth v. Klock*, 29 Mich. 290.

¹ *Taylor v. Moore*, 47 Conn. 278.

² 9 Co. 38 a; *Plowd.* 281; *Wms. Exrs.* 293, 629; *Woolley v. Clark*, 5 B. & Ald. 745; 2 W. Bl. 692; *Whitehead v. Taylor*, 10 Ad. & L. 210.

³ In order to sue, as we shall see hereafter, letters of authority appropriate to the jurisdiction were generally needful. See *Dixon v. Ramsay*, 3 Cranch, 319. Where an executor had actual possession of the personal property in

question, he might, on general principle, sue another who had acquired it under a contract with himself, or, as having been wrongfully dispossessed by a stranger, sue for the wrong done him in trespass, trover, or replevin. For here actual possession makes a *prima facie* title sufficient to serve as the foundation of an action. *Plowd.* 281; *Oughton v. Seppings*, 1 B. & Ad. 241; *Wms. Exrs.* 306, 307. A bailee's title is enough for many such cases. But where the executor's suit is on behalf of the estate, and in a representative capacity, the letters must be produced. 1 Salk. 285; 3 Taunt. 113; *Webb v. Adkins*, 14 C. B.

the testator's personalty, entering peaceably for that purpose into the house of heir or stranger; he might, as it was said, collect, release, and compound debts due the estate;¹ he might distrain for rent due the testator, and enter upon his terms for years; he might settle or assent to the claims of creditors and legatees upon the estate; he might, at discretion, sell, give away, assign, or otherwise transfer and dispose of the testator's goods and chattels; and all this before probate.² Although the executor might die before probate after doing any of those acts, the act itself stood firm and good; and, by such death, the executorship was not avoided, but only brought, so to speak, to an end.³ If, however, what the executor had thus done before probate was relied upon by another, as the foundation of his title or right, and its enforcement sought, — as in the case of a transfer of certain assets belonging to the estate, — it would be necessary to show a probate; and hence, subsequent letters to this executor, or, if he died without having obtained them, letters to another with the will annexed, would have to be produced.⁴ And so, correspondingly, if enforcement was sought on behalf of the estate against another, by virtue of an arrangement entered into before probate.⁵

It is generally admitted in this country, as in England, that one's appointment as executor relates back so as to absolve him from all personal liability for acts committed before his appointment without a strict probate sanction; though this, by fair inference, affords immunity only as to acts which come properly within the authority and scope of a rightful representative.⁶ American legislation departs so far, however, from the older theory, that, as we have elsewhere shown,

401. Yet it is held that, provided the credentials be produced in season, the suit may be commenced before probate. 1 Salk. 307; Wms. Exrs. 308.

¹ But as to releasing, compounding letters, etc., see c. 5, *post*, Part IV.

² Godolph. pt. 2, c. 20; Rex v. Stone, 6 T. R. 298; Whitehead v. Taylor, 10 Ad. & L. 210; Wms. Exrs. 302, 303.

³ 1 Salk. 309; Johnson v. Warwick, 17 C. B. 516; Wms. Exrs. 303, 304.

⁴ Johnson v. Warwick, 17 C. B. 516; Pinney v. Pinney, 3 B. & C. 335.

⁵ Newton v. Metropolitan R., 1 Dr. & Sm. 583.

⁶ Bellinger v. Ford, 21 Barb. 311; Brown v. Leavitt, 6 Fost. 493; Stockton v. Wilson, 3 Penn. St. 130; Shirley v. Healds, 34 N. H. 407; Dawes v. Boylston, 9 Mass. 337; Johns v. Johns, 1 McCord, 132; Wiggin v. Swett, 6 Met. 197.

no appointment as executor may be safely deduced from the will itself, even though the rightful probate of that will were unquestioned; for, as American statutes so frequently provide, the will should be presented speedily for probate, nor should executor designated therein act as one having genuine authority, until he has been duly appointed by the court and has qualified by giving bonds. Hence, acts not of themselves justifiable in the prudent interest of the estate, pending one's full appointment, are not likely to be upheld as readily in this country as in England; and, if because of his death or the proper refusal of the court to appoint him, or his failure to qualify as the law directed, some one else should be appointed in his stead, his imprudent and officious dealings with the estate, meanwhile, his needless transfers, and hasty promises, may involve him and his own estate in trouble, rather than bind the estate which he assumed to represent.¹

§ 195. Acts done by a Rightful Administrator before Qualifying.—An administrator may, by relation, ratify and make valid all acts which come within the scope of a rightful ad-

¹ See next section as furnishing analogous cases under the head of administration. But a rightful executor, though without official authority in Connecticut, may lawfully receive into his possession here assets if voluntarily delivered to him; and may approve of payments in some instances. *Selleck v. Rusco*, 46 Conn. 370.

As to the executor's title, the true theory appears to be (unless where the doctrine of relation applies) that the personal estate of the deceased vests in him before probate, as a sort of trustee for the creditors, legatees, and whoever else may be interested in the estate under the will. *Clapp v. Stoughton*, 10 Pick. 463; *Shirley v. Healds*, 34 N. H. 407. He is not only sole trustee in this sense, but the only legal representative of the deceased, and, as such, the person who should cause the will to be proved; and he is aggrieved by any

decree which divests him of his title in the estate of the deceased, or which disallows, rejects, or refuses the probate of the will. *Wiggin v. Swett*, 6 Met. 197; *Shirley v. Healds*, 34 N. H. 407; *Brown v. Gibson*, 1 Nott & M. 326. All this, we presume, is to be said in strictness only of an executor who virtually accepts the trust under the will, and proceeds for probate, qualification, etc., consistently with that intention; for, if he refuses the trust, or the will is invalid, or he fails to qualify, the title appears to be practically in abeyance as in the case of administration; and another title, such as that of special administrator, must sometimes and for certain purposes intervene.

Notice of the dishonor of a note sent to an executor before his qualification is sufficient. *Shoenberger v. Savings Institution*, 28 Penn. St. 459.

ministrator's authority;¹ and whatever dealings, justifiable on this principle, and in the interest of the estate, he may have had with it before his appointment, are cured, in modern practice, by the grant of subsequent letters.² The modern tendency, in fact, is to look indulgently upon previous acts and dealings, not positively arbitrary and wrongful on his part, for which he can show a subsequent appointment; and thus is lessened the force of earlier distinctions which availed more strongly in an executor's favor. Such beneficial acts as have been seen not to constitute one an executor *de son tort* are certainly protected by a subsequent appointment as administrator; and even acts less justifiable in theory, such as selling or pledging sundry chattels of the deceased, have been sustained on the ground that the act was beneficial to the estate,³ or at least such as others had no reason to complain of.⁴ The greater leniency appears due where the appointee had previously the responsibility of custodian of the dead person's effects, and acted virtually in that capacity.

To an action on a judgment obtained against an executor *de son tort*, the latter has been permitted to show his subsequent appointment as administrator, and a full settlement of the estate as insolvent;⁵ and his promise before appointment to pay a debt will not prevent the bar of limitations to a suit brought after his appointment against him.⁶ As a defendant, such an administrator, properly speaking, becomes personally answerable for the transactions, without the scope of author-

¹ Alvord v. Marsh, 12 Allen, 603; Outlaw v. Farmer, 71 N. C. 35.

² Bellinger v. Ford, 21 Barb. 311; Emery v. Berry, 8 Fost. 473; Shillaber v. Wyman, 15 Mass. 322.

³ Moore, 126; 1 Salk. 295; Wms. Exrs. 407, 408; Mountford v. Gibson, 4 East. 446; Magner v. Ryan, 19 Mo. 196; Rattoon v. Overacker, 8 Johns. 126; Priest v. Watkins, 2 Hill (N. Y.) 225.

⁴ Taylor v. Moore, 47 Conn. 278. Where one before his appointment buys hay to feed cattle belonging to the estate, he may be sued for the price,

notwithstanding credit was given to the estate. "Credit to the estate means, if it means anything, credit to the administrator, who, if he makes a cash act for the benefit of the estate after the intestate's death, may be personally sued thereon." Tucker v. Whaley, 11 R. I. 543. And see Luscomb v. Ballard, 5 Gray, 403.

⁵ Olmsted v. Clark, 30 Conn. 108. But not *seem* to set up his own wrong so as to defeat the judgment. Walker v. May, 2 Hill Ch. 22.

⁶ Hazelden v. Whitesides, 2 Strobb. 353. See *post*, Pt. V. c. 5.

ity;¹ but may, after his appointment, obtain immunity on his accounts for such transactions as are proper.²

According to the old law, it is true, executors and administrators were differently treated.³ For an administrator's title, being founded in letters and on a formal appointment by the court, such officer had no right of action, it was said, until he had actually received his credentials.⁴ This distinction, however, has become of little consequence at the present day, — and especially in the United States, — for both executors and administrators are required by our probate law to qualify before the appointment can be considered as of full legal force. Appointment and qualification, whether of executor or administrator, cause one's letters of authority, when granted, to relate back for most practical purposes, therefore, to the time of the death of the testate or intestate whose estate is to be settled, the title meanwhile being in a sort of abeyance.⁵ Even the old text writers on English ecclesiastical law admitted that, for particular purposes, letters of administration would relate back of the date of grant to the time when the intestate died; thus, an administrator might bring trespass or trover for goods of his intestate taken before letters were granted him, the necessity of the case overriding the legal theory of a dispossession;⁶ so might he ratify a sale of effects of the deceased made before his appointment, and recover the price,⁷ and in various other

¹ Wms. Exrs. 405-407; 1 Salk. 295; 5 B. & Ad. 188; Parsons v. Mayesden, 1 Freem. 152.

² Mountford v. Gibson, 4 East, 446; Wms. Exrs. 407. As to confirming a sale after appointment, see also Hatch v. Proctor, 102 Mass. 351.

³ Woolley v. Clark, 5 B. & Ald. 745; Wms. Exrs. 629; 9 Co. 38 a, 39 a; Whitehead v. Taylor, 10 Ad. & El. 210; 2 W. Bl. 692; Shirley v. Healds, 34 N. H. 407; Dawes v. Boylston, 9 Mass. 337; Johns v. Johns, 1 McCord, 132; Wiggin v. Swett, 6 Met. 197. The executor may accordingly release a debt due to the deceased before procuring probate. 9 Co. 39 a. So he may main-

tain trespass, trover, etc., for goods taken out of his possession before probate of the will. Com. Dig. Exrs. B, 9; *supra*, § 194.

⁴ Woolley v. Clark, 5 B. & Ald. 745; Wms. Exrs. 630; 5 B. & Ald. 204; Pratt v. Swaine, 8 B. & C. 285.

⁵ Lawrence v. Wright, 23 Pick. 128; Alvord v. Marsh, 12 Allen, 603; Babcock v. Booth, 2 Hill, 181; Wells v. Miller, 45 Ill. 382; Goodwin v. Milton, 25 N. H. 458.

⁶ Foster v. Bates, 12 M. & W. 226, 233; Wms. Exrs. 631.

⁷ Foster v. Bates, 12 M. & W. 226, 233.

instances take officially the benefit of contracts previously made on account of the estate.¹ Furthermore, on the doctrine of relation, an administrator entitled to bring trover for a conversion has been permitted to waive the tort and recover as on a contract. And there are various instances of acts done by an administrator before appointment, such as selling and contracting charges, which, being prudent and reasonable in the interest of the estate, have been held valid ; for, though the act were that of an executor *de son tort*, in some such instances, yet letters may relate back so as to legalize even technically tortious acts ;² and here we are to observe that the peculiar liability of an executor *de son tort* to creditors, to the rightful administrator, or to others who may have suffered by his wrongful acts, is not necessarily in question when the transaction itself calls for enforcement.³ Moreover, an executor might commence an action at law before proving the will, getting his appointment completed in season for his declaration, while an administrator would have to get his appointment first ; and yet, in chancery suits, executors and administrators have been treated on substantially an equal footing in this respect.⁴ Modern statutes, to some extent, regulate expressly the devolution of title to personal property where one dies intestate ;⁵ and tend to put executors and administrators, before the issuance of letters, upon a corresponding footing of authority.⁶

¹ Wms. Exrs. 632; Bodger v. Arch, 10 Ex. 333.

² Wms. Exrs. 406, 632; Welchman v. Sturgis, 13 Q. B. 552; 1 Salk. 295; Hatch v. Proctor, 102 Mass. 351.

³ Hatch v. Proctor, 102 Mass. 351, 354.

⁴ Bateman v. Margerison, 6 Hare, 496; 3 P. Wms. 351; Wooldridge v. Bishop, 7 B. & C. 406; Wms. Exrs. 405; Gathfield v. Hanson, 57 How. (N. Y.) Pr. 331.

⁵ Thus the English statute 3 & 4 Wm. IV. c. 7, permits the administrator to claim for the purposes of the act as if he had obtained the estate without interval after the death of the deceased.

By stat. 22 & 23 Vict. c. 95, § 19, the personal estate and effects of any person dying intestate, shall from his decease, and until the grant of administration vest in the judge of the court of probate to the same extent, etc., as heretofore in the ordinary. See Wms. Exrs. 635.

⁶ By 2 New York Rev. Stat. 71, § 16, the executor is inhibited from transferring assets until letters are issued to him; and the statute applies notwithstanding full powers of sale are expressly conferred by the will. Humbert v. Wurster, 22 Hun (N. Y.) 405.

A person to whose order money belonging to an estate was paid, before an administrator was appointed, is account-

§ 196. **Whether a Suitable Representative who has intermeddled can be compelled to take out Letters.**—In English practice, agreeably to the theory that an executor's title is mainly derived from his testator, the person designated as executor under a will, who performs an act of administration, cannot afterward refuse to probate the will and accept the office. He is held, in other words, an executor of right rather than executor in his own wrong.¹ This course seems incompatible with the American doctrine, which refers the appointment rather to one's qualification by proving the will, furnishing bonds, and satisfying the court that he is suitable in fact for the office; from which aspect, indeed, one who had acted imprudently and injuriously to the estate, before receiving letters, might be deemed most unsuitable. Neither in English nor American practice will a widow, next of kin, or other person lawfully entitled to take out letters of administration, be compelled to do so because of having previously intermeddled; but some one else may receive the appointment.²

On the other hand, save so far as injurious intermeddling may bear upon the issue of personal suitability for the trust, it appears to be no objection to the appointment and qualification of a person as executor or administrator who

able therefor to the administrator when appointed, although the money or its avails never came to his actual use. *Clark v. Pishon*, 31 Me. 503.

"By the law of this State," observes the court in *Hatch v. Proctor*, 102 Mass. 351, 354, "the letters of administration, by operation of law, make valid all acts of the administrator in settlement of the estate from the time of the death. They become by relation lawful acts of administration for which he must account. And this liability to account involves a validity in his acts which is a protection to those who have dealt with him." And see *Hoar, J.*, in *Alvord v. Marsh*, 12 Allen, 603. The doctrine of relation, however, appears not here applicable so as to constitute an estoppel as to title against the sound interests of the estate. *Cooley, J.*, in *Gilkey v. Hamilton*, 22 Mich. 283, 286,

287, well observes that, while this doctrine is quite necessary to the protection of the interests of the estate, this necessity is the reason upon which it rests, and it is no part of its purpose to legalize lawless acts which may, and generally would, work the estate a prejudice. "Certainly," he adds, "there is nothing in the fact that a man is appointed administrator, who has previously misconducted himself, which can justly raise against the estate any equities, or which can justly deprive the creditors or next of kin of any of their rights in its assets." And see *Morgan v. Thomas*, 8 Ex. 308; *Crump v. Williams*, 56 Ga. 590.

¹ *Perry, Goods of*, 2 Curt. 655; *Wms. Exrs.* 276.

² *Ackerley v. Oldham*, 1 Phillim. 248; *Wms. Exrs.* 438.

claims the appointment of right, that he is an executor *de son tort* of the estate.¹

§ 197. *Intermeddling by a Third Person after the Grant of Letters Testamentary or Administration.* — After probate of the will, and the grant of letters testamentary, or, as the case may be, after the administrator has been duly appointed and qualified, there is a person legally authorized to take full possession of the dead person's personal property. Whoever shall afterwards injuriously intermeddle with the estate renders himself liable to suit as a trespasser.² Such intermeddler is not by technical construction an executor *de son tort*; but if his interference be actually under claim of an office, he might be thus charged; since, according to the better opinion, it seems not logically absurd that there should exist an executor of right and an executor *de son tort* at the same time.³ One upon whom the character of executor *de son tort* fastens, may be sued as such, notwithstanding the legal representative qualified afterwards and before action was brought.⁴

¹ Carnochan v. Abrahams, T. P. Charlt. (Ga.) 196; Bingham v. Crenshaw, 34 Ala. 683.

² Salk. 313; Wms. Exrs. 261.

³ Wms. Exrs. 261, and note, commenting on Peake, N. P. C. 87, and 1 Turn. & R. 438, which bear *contra*.

⁴ 1 Salk. 313; Wms. Exrs. 261.

PART III.

ASSETS AND THE INVENTORY.

CHAPTER I.

ASSETS OF AN ESTATE.

§ 198. **What comprise Assets of a Deceased Person's Estate; Personal contrasted with Real Assets.**—The word “assets,” which may be used in various primary senses, as its French derivation indicates, our English and American law usually applies to such property belonging to the estate of a deceased person as may rightfully be charged with the obligations which his executor or administrator is bound to discharge.¹

In modern practice, and conformably to our modern legislation, all the property of a deceased person, real, personal, or mixed, is liable for his debts and the usual charges incidental to death and the settlement of his estate. But a fundamental distinction has always been recognized between the real and personal estate, in the application of this rule; for the personal estate left by the deceased constitutes the primary fund for all purposes of administration, his real estate as a secondary fund not being available for assets until the personalty has been exhausted, leaving obligations still undischarged; nor available at all without proceedings which courts of equity pursue with strict care and even reluctantly. Personalty vests immediately in the executor or administrator for the purposes of his trust; but real estate (subject to

¹ The word “assets,” from the French *assez*, is here used to denote property “sufficient” to make a representative chargeable to creditors and legatees, or parties in distribution, so far as that property extends. Wms. Exrs. 1655. The older writers sometimes applied to this portion of the estate the term “assets enter mains” in contradistinction to “assets per descent,” by which latter expression was designated that portion which descends to the heir. Ib.

such special exceptions as a will may have created) to the heir or devisee, only to be divested afterwards under circumstances of necessity, as regards legal obligations, and when the personal assets prove insufficient for a due settlement of the liabilities of the estate.

§ 199. **Personal Property of the Decedent vests in the Executor or Administrator.**—In pursuing his first and important duty of gathering, as into a heap, under his own control, for the purposes of administration, the property which the deceased may have left behind, an executor or administrator seeks rightfully, therefore, simply the personal property. Goods and chattels of the deceased person are to be traced out and brought into this trust officer's immediate possession and control; for these are the assets which concern him; and title to such assets or to the personal property of the deceased vests in the executor or administrator, if not prior to his probate qualification, at least back by relation after he has qualified to the instant of the death of his testate or intestate.¹

§ 200. **Enumeration of Personal Assets; Choses in Action as well as Choses in Possession.**—Incorporeal property or money rights, as well as corporeal personal property, — bonds, notes, book accounts, bank deposits, debts and balances due the deceased, as well as his cash, household furniture, ornaments, cattle, vessels, and sole stock-in-trade, — all these vest in the executor or administrator, therefore, as assets for administration purposes.² Legacies and distributive shares vested in one person by another's death, and without restriction, go, on his death before receiving the same, to his own personal representative as assets.³

¹ *Rockwell v. Saunders*, 19 Barb. 473; *supra*, § 195; *Wells v. Miller*, 45 Ill. 382; *Touchst.* 496; *Wms. Exrs.* 1656; *Snodgrass v. Cabiness*, 15 Ala. 160.

What is personal property, as contrasted with real, the reader will find discussed at length in 1 Schoul. Pers.

Prop. 25-160; *Wms. Exrs.* 650-770, and Perkins's notes.

² *Wms. Exrs.* 703 *et seq.*, 1656; *Slocum v. Sanford*, 2 Conn. 533; *Bullock v. Rogers*, 16 Vt. 294; *Kohler v. Knapp*, 1 Bradf. (N. Y.) 241.

³ *Storer v. Blake*, 31 Me. 289; *Pease v. Walker*, 20 Wis. 573.

Savings and accumulations out of the general personal estate become assets as well as the original estate itself.¹ Principal and interest, capital and the income and profits thereof, vest in the personal representative, upon whom, subject to rules of apportionment upon decease and specific dispositions under a will, devolves usually the right and duty of collecting and accounting for the interest and income, for the benefit of the estate and those interested in it, whether it accrue before or after the decease of the person, in the course of a prudent management of his trust.² So, too, goods which have accrued by increase, and the offspring of animals belonging to the deceased.³ Likewise, the profits of a trade or business, carried on under or independently of a testator's directions, go to swell the assets of the estate; and profits made by speculations with the assets, which the executor or administrator had no right to engage in, or rightfully with funds left as invested by the deceased, and not yet recalled, belong legitimately to the estate, for the benefit of those interested therein. It is seen, therefore, that assets are not necessarily restricted to personalty which the deceased owned in his lifetime, but embrace, usually, the proper and just earnings and accretions of those assets, as they vest in the course of administration.⁴

Rights under a contract must be treated as personalty, and hence as vesting a title for assets in the executor or administrator of the estate.⁵ So with a claim for services rendered by the decedent during his lifetime, or for wages due.⁶ Or the fees or salary of an employee or public officer.⁷ Or one's patent rights and copyrights, subject to the terms of the statute relating thereto.⁸ So with money receivable from the govern-

¹ *Wingate v. Pool*, 25 Ill. 118.

² See *Sweigart v. Berk*, 8 S. & R. 299; *Ray v. Doughty*, 4 Blackf. 115; *Wingate v. Pool*, 25 Ill. 118.

³ *Wms. Exrs.* 1657.

⁴ *Wms. Exrs.* 1658; *Gibblett v. Read*, 9 Mod. 459.

⁵ *Stewart v. Chadwick*, 8 Iowa, 463; *Pollock, Re*, 3 Redf. (N. Y.) 100. A mere right to preëempt land goes to the

executor or administrator. *Bowers v. Keesecker*, 14 Iowa, 301.

⁶ *Lappin v. Mumford*, 14 Kan. 9.

⁷ *Steger v. Frizzell*, 2 Tenn. Ch. 369. Salary voted by a company to a person after his decease, and paid to his executor, constitutes assets in the executor's hands. *Loring v. Cunningham*, 9 Cush. 87.

⁸ 1 Schoul. Pers. Prop. 654, 671.

ment in adjustment of a claim (unless the title, in case of a claimant's death, goes otherwise, according to the statute), such as indemnity money given by a foreign treaty.¹ Whatever chattel right one has with another, not subject to the harsh rule of survivorship, is thus included.² So is a deceased partner's interest in the partnership firm of which he died a member;³ and in computing such interest, the good will of the business is proper to be considered.⁴ So is a share in a newspaper business⁵ or in valuable recipes.⁶ Damages assessed in favor of the deceased during his lifetime constitute assets;⁷ also the right to bring a suit for damages suffered by the decedent, in respect of person or property;⁸ and, in general, claims, demands, and causes of action of every kind, which survive by common law or statute, so that the personal representative may sue upon them, together with the incidental recompense or indemnity which may attend the suit.⁹

Personal annuities, or annual payments of money not charged on real estate, constitute personal property, and the right to claim arrears goes to one's executor or administrator, subject to the old rule against apportionment, so far as

¹ *Foster v. Fifield*, 20 Pick. 67; *Thurston v. Doane*, 47 Me. 79. Cf. *Eastland v. Lester*, 15 Tex. 98.

² *Wms. Exrs.* 652. See as to joint and common ownership of chattels, 1 Schoul. Pers. Prop. 186-199; *Harris v. Ferguson*, 16 Sim. 308.

³ *Wms. Exrs.* 651, 652; *Buckley v. Barber*, 6 Ex. 164; *Moses v. Moses*, 50 Ga. 9; *Platt v. Platt*, 42 Conn. 330; *Pitt v. Pitt*, 2 Cas. temp. Lee, 508; *Schenkl v. Dana*, 118 Mass. 236. And see *Hutchinson v. Reed*, 1 Hoffm. (N. Y.) 316. The usual rule is, that on the decease of a partner the partnership must be wound up and accounts settled between the surviving partner and the representative of the deceased member. See *Colly. Partn.* § 199; 1 Schoul. Pers. Prop. 233.

⁴ *Platt v. Platt*, 42 Conn. 330. Here the business was continued after such partner's death. And see *Wms. Exrs.*

1659. Death generally dissolves a partnership, and compels the affairs to be wound up. A subscription-book or list containing the names and addresses of correspondents may constitute the good will of a particular business and valuable assets of the estate. *Thompson v. Winnebago Co.*, 48 Iowa, 155. But see *Seighman v. Marshall*, 17 Md. 550.

⁵ *Gibblett v. Read*, 9 Mod. 459.

⁶ *Ib.*; *Wms. Exrs.* 1659.

⁷ *Astor v. Hoyt*, 5 Wend. 603; *Welles v. Cowles*, 4 Conn. 182.

⁸ As to this point, and for distinctions in respect of real and personal property, see c., *post*, as to survival of actions, collection of assets, etc.

⁹ Money recovered upon an appeal bond given to executors as an appeal from a judgment obtained by them in that character constitutes assets. *Sasser v. Walker*, 5 Gill & J. 102.

that rule may apply.¹ A "rent-charge," that is, a burden imposed upon and issuing out of lands, should, however, be distinguished from a personal annuity.²

§ 201. **Enumeration of Personal Assets continued; Contingent and Executory Interests.** — Not absolute interests alone in personal property pass to the executor or administrator as assets, but contingent interests likewise, provided the interest be valuable at all to the estate.³ For *choses in action*, and incorporeal rights of every kind upon which a value may be placed, are to be classed among assets. In short, contingent and executory interests, though they do not vest in possession, may vest in right so as to be transmissible to executors or administrators. But if the contingency upon which the interest depended was the endurance of the life of the party until a particular period, whereas his death occurred in fact sooner, there would occur a lapse or extinguishment of the interest, and nothing transmissible to his personal representative remaining.⁴

§ 202. **Enumeration of Personal Assets continued; Stock; Public and Corporation Securities.** — Stock is in modern times usually treated as personal property, notwithstanding the corporation, a railway or turnpike company, for instance, derive its profits in a certain sense from the use of real estate.⁵

¹ 1 Schoul. Pers. Prop. 703, 704; Co. Lit. 2 a; Wms. Pers. Prop. 5th Eng. ed. 180-182.

² 2 Bl. Com. 40, 41. It was formerly questioned whether annuities were realty or personalty; for, when granted with words of inheritance, an annuity is held to descend to the heir to the exclusion of a personal representative. *Turner v. Turner*, Ambl. 782. But this appears to be out of respect simply to the express terms of its creation. Like a life insurance policy, an annuity, when given without words of restriction, passes to the personal representative for the benefit of the estate. Lord Hardwicke once observed that it was a personal

inheritance which the law suffers to descend to the heir. *Stafford v. Buckley*, 2 Ves. Sen. 170. And see Wms. Exrs. 809, 810.

³ Wms. Exrs. 653, 887; *Peck v. Parrot*, 1 Ves. Sen. 236; *Fyson v. Chambers*, 9 M. & W. 460; *Clapp v. Stoughton*, 10 Pick. 268; *Ladd v. Wiggins*, 35 N. H. 421; *Johns v. Johns*, 1 McCord, 132; *Dunn v. Sargent*, 101 Mass. 336.

⁴ Wms. Exrs. 889.

⁵ See 1 Schoul. Pers. Prop. 617-624; *Bligh v. Brent*, 2 Y. & C. 268; *Weyer v. Second Nat. Bank*, 57 Ind. 198. Canal shares, etc., were considered real property, but this rule has long since changed. To remove all doubt, the

Dividends declared by a stock company during the decedent's life, and not collected, belong to his estate as personal assets, as does also the stock;¹ while, in respect of dividends declared and payable after his death, the executor or administrator usually collects for the purposes of his trust, accounting in a proper manner, as the directions of the testator and the general law of administration may require. Stock in the public funds, and government and municipal bonds and securities of all kinds, are likewise treated as personal property at the present day.² And all these, being personal property of the incorporated sort, are transmitted as personal and primary assets to the executor or administrator upon the owner's decease.

§ 203. **Enumeration of Personal Assets continued; Personal Property taken or given in Security.**—Debts owing the deceased upon chattel security, such as pledge, mortgage, and lien to the testate or intestate, give the benefit of the security to the estate; and the security must not be left out of the consideration in the assets. But bonds executed to an administrator or executor in his fiducial character, in consideration of assets transferred by him, are not necessarily assets for the benefit of the estate.³ Security, in general, enures for the direct benefit of that upon which the security was placed; and hence a bond of indemnity, or a judgment recovered thereon by the deceased during his lifetime, vests only as assets for the purpose of applying it to the satisfaction of the debt or demand against which the indemnity was afforded.⁴

Debts, on the other hand, owing from the deceased, and secured by pledge or mortgage of his personal property, or a lien thereon, leaves the surplus as general assets of the estate beyond such sum as may be required for discharging

legislature, in acts of incorporation, frequently declares that the stock shall be considered personal property. See *Dry-butter v. Bartholomew*, 2 P. Wms. 127; Wms. Exrs. 811.

¹ *Welles v. Cowles*, 4 Conn. 182.

² Wms. Exrs. 812, 813; 1 Schoul. Pers. Prop. 614-616.

³ *Saffran v. Kennedy*, 7 J. J. Marsh. 187.

⁴ *Molloy v. Elam, Meigs* (Tenn.) 590.

the security; or, as one might say, the personal property given in security constitutes assets, subject to the preferential claim of the secured creditor.¹

§ 204. **To constitute Personal Assets, the Title must have stood in the Decedent at his Death.** — The deceased must have owned such personal property or been the legal creditor, at the time of his death, since otherwise the title cannot devolve upon his legal representative; and the decedent's title, when he died, is the criterion of the title which devolves upon his personal representative. Thus, notes, securities, or other incorporeal property *bond fide*, and regularly transferred to others by the decedent during his lifetime, and indorsed, assigned, or delivered, with mutual intention that the title should so pass, do not vest in the representative of the deceased;² and the same may be said of corporeal goods and chattels, duly delivered upon a like understanding, by the decedent.³ If, however, the transfer was voluntary and fraudulent against one's creditors, remedies are open and should be pursued, as we shall see, for assailing such stranger's title.⁴ And since legal transfer implies parting with dominion over the thing, any professed transfer during one's life which left the possession, control, and power to revoke in the transferee, keeps his title virtually undivested, so that at his decease the chattel must be administered as assets.⁵ Nor does a bailment, made under instructions which death countermands, divest the donor's title.⁶

¹ 1 Leon. 155, 225; Wms. Exrs. 1660; Vincent v. Sharp, 2 Stark. N. P. 507; Haynsworth v. Frierson, 11 Rich. (S. C.) 476.

² Wms. Exrs. 1675; 1 Salk. 79.

³ Thomas v. Smith, 3 Whart. 401; Garner v. Graves, 54 Ind. 188; Burke v. Bishop, 27 La. Ann. 465. As to the general subject of assignment, see 2 Schoul. Pers. Prop. 673. The old doctrine of the law was that a *chose in action* could not be assigned. 2 B. Moore, 186, 187. But equity has so encroached upon the law that every species of in-

corporeal property, with a few nominal exceptions, may now be practically assigned so as to pass the title. 2 Schoul. Pers. Prop. 673.

⁴ See §, *post*.

⁵ Cummings v. Bramhall, 120 Mass. 552; Madison v. Shockley, 41 Iowa, 451.

⁶ Bigelow v. Paton, 4 Mich. 170. A promissory note should be charged as assets, notwithstanding oral expressions used by the deceased to his executor insufficient to constitute a release. Byrn v. Godfrey, 4 Ves. 6.

Where, on the other hand, personal property attached by the trustee process was assigned by the owner subject to the attachment, and such attachment was dissolved by the owner's death, it was held that the property passed by the assignment and did not constitute assets available for administration.¹ Advancements made during life to children are regarded essentially as gifts; so that these are not to be reckoned among assets of the estate.² The mistaken delivery of a thing by its custodian to the executor or administrator, where the title had in fact passed out of the owner before his death, does not conclude it as assets; for it is proper that the mistake be rectified.³

§ 205. **Personal Property of Another among the Goods of Deceased not Assets; Identification.** — If goods, money, or securities belonging to another person lie amongst the goods of the deceased, capable of identification, and they come altogether to the hands of the personal representative, such other person's things are not to be reckoned among assets of the estate.⁴ Nor is money collected by an attorney, factor, or agent, and kept distinct and unmixed with the rest of his property.⁵ So, property held by a trustee or fiduciary officer is not assets in the hands of his executors, administrators, or assignees; but a new trustee should rather be appointed to hold the fund in the stead of the decedent.⁶ Only those things in which the decedent had a beneficial interest at his death are assets, and not those which he holds in trust or as the bailee or factor of another.⁷

In order, however, that the third party or new fiduciary may claim his specific thing as separable from assets, its identity should have been preserved; and the rule is that if the deceased held money or other property in his hands

¹ Coverdale v. Aldrich, 19 Pick. 391.

² See *post* as to advancements. Wms. Exrs. 1498, 1502.

³ Sherman v. Sherman, 3 Ind. 337.

⁴ Wms. Exrs. 1675; Cooper v. White, 19 Ga. 554.

⁵ Schoolfield v. Rudd, 9 B. Mon. 291.

⁶ United States v. Cutts, 1 Sumn. 133;

Johnson v. Ames, 11 Pick. 173; Green v. Collins, 6 Ired. L. 139; Thompson v. White, 45 Me. 445; Wms. Exrs.

1675.

⁷ See Shakespeare v. Fidelity Co., 97

Penn. St. 173.

belonging to others, whether in trust or otherwise, and it has no ear-mark and is not distinguishable from the mass of his own property, it falls within the description of assets; in which case the other party must come in as a general creditor.¹

The receiver of letters, we may add, has but a qualified property in them; they pass to the executor or administrator, but not as available assets, inasmuch as the sender is interested in their publication.²

§ 206. **Personal Property of the Decedent left in Another's Possession is Assets.** — Personal property belonging to the deceased, on the other hand, which was in the possession or control of a third person, whether rightfully or wrongfully, at the time of his death, will vest as assets in the executor or administrator of the owner; and to him the custodian should surrender possession; though here, once more, the decedent's property must be capable of identification, else there is left but a right of action to recover their value or damages. Chattels and money in the hands of a deceased minor's guardian vests likewise for purposes of administration in the minor's executor or administrator, if there be one; and this even though the guardian may be eventually entitled to the same as legatee or distributee after the estate is settled.³

§ 207. **Personal Property constitutes Assets notwithstanding Ultimate Title of Legatees, Heirs, etc.** — Personal property constitutes assets for the purposes of administration and a general winding up of the deceased person's estate; even though upon a due adjustment that property or its residue shall go to legatees, general or specific, or to residuary legatees or distributees, or trustees, if not otherwise needed; for administration is in fact the crucial test by which the title of all such parties, through the sufficiency or deficiency of the estate,

¹ Story, J., in *Trecothick v. Austin*,
² *Eyre v. Higbee*, 35 Barb. 502;
³ 4 Mason, 29; *Johnson v. Ames*, 11 Pick. 172. *Pope v. Curl*, 2 Atk. 342.
⁴ *Bean v. Bumpus*, 22 Me. 549.

shall be determined, and the title devolves first of all upon the decedent's personal representative.¹

§ 208. **Debt due from Representative or Legatee, etc., to the Decedent constitutes Personal Assets.**—By the common law, the appointment of one's debtor to be the executor of the will was held to extinguish the debt;² and so far was the rule carried, out of favor to the representative, that if he died before probate or was one of joint debtors, extinguishment occurred, notwithstanding the technical reasons given for the doctrine.³ But this is changed in most parts of the United States by statutes whose intendment appears to be to place the debt owing from a personal representative upon the same footing with debts due the estate from other sources;⁴ and our probate and equity rule is to hold the executor accountable for the debt as assets. In some States, where the old rule has been discarded, the right of those interested in the estate to compel the executor or administrator to charge himself with an indebtedness due from him to the deceased, is fully recognized; but it is said that as soon as the debtor is appointed, if he acknowledges the debt, he has actually received so much money and is answerable for it, he and the sureties of his probate bond, in like manner as if he had received it from any other debtor of the deceased.⁵

¹ See *Woodfin v. McNealy*, 9 Fla. 256.

² *Cro. Car.* 373; 1 *Salk.* 299; *Cheetnam v. Ward*, 1 B. & P. 630; *Wms. Exrs.* 1310; *Co. Lit.* 264 b.

³ Perhaps, where the executor renounced, the rule was different. Intendment of the will appears to be the true reason; but that alleged by the courts was, the rights of debtor and creditor united in one and the same person. *Wms. Exrs.* 1310.

⁴ *McCarty v. Frazer*, 62 Mo. 263; *Adair v. Brimmer*, 74 N. Y. 539; *Soverhill v. Suydam*, 59 N. Y. 142; *Jacobs v. Woodside*, 6 Rich. 490; *Shields v. Odell*, 27 Ohio St. 398. And see English stat. 1 Vict. c. 26, § 7; 20 & 21 Vict. c. 77, § 79; *Wms. Exrs.* 15, 286,

1312. The effect of the New York statute charging the representative as for money, etc., is not to discharge any security given for the debt. *Soverhill v. Suydam*, *supra*.

⁵ *Stevens v. Gaylord*, 11 Mass. 269; *Leland v. Felton*, 1 Allen, 531, and cases cited; *Hall v. Hall*, 2 McCord Ch. 269. Upon the acceptance of the trust, and returning the same in the inventory as assets of the deceased, a correspondent legal liability is assumed which cannot be divested by a subsequent resignation of the trust. *Leland v. Felton*, 1 Allen, 531. Indeed, the liability to duly account for such a debt is assumed on acceptance of the office. *Ib.*

Yet the return of a debt in the inven-

The fact that the representative charges himself in his inventory or account with his debt, settles the question that he owes the estate and the amount of his debt; it is a fact upon which great stress is laid; but an executor cannot escape his liability or change the character of it by failing to charge himself with his own debt; nor is charging himself with it the only way in which the fact of his indebtedness may appear or be proved.¹ An extinguishment of the instrument upon which the indebtedness was founded, may, independently of statute, occur here by operation of law, with the modern consequence that the sums due thereon have become realized assets of the estate;² but the rule appears not to apply regardless of the particular circumstances.

A debt due the deceased from a legatee or distributee is furthermore reckoned as assets by the modern rule, in the absence of evidence that forgiveness of the debt was intended; and for realizing upon this indebtedness, the legacy or surplus accruing to such person may afford good security.³ Forgiveness of a debt, therefore, operates *pro tanto*, if so limited by the deceased; and this is a rule of general application. Thus, where one leaves a legacy and releases only

tory as solvent is usually *prima facie* proof that it is collectible, and by no means conclusive proof that it has been collected. The rule if asserted, as in the text, with especial stringency against the representative's own debt to the deceased, is from motives of policy, and to discourage bad faith under circumstances of especial temptation. The more consistent rule appears to be that the return of the inventory affords a presumption only, and that if the representative shows that he cannot pay, and has not paid, he need not be charged with the debt as cash. *Baucus v. Stover*, 24 Hun, 109; *United States v. Eggleston*, 4 Sawyer, 199.

The appointment *de bonis non* of one who was surety on the bond of his predecessor does not make a debt due the estate from such predecessor assets in his hands by reason of his suretyship. *Shields v. Odell*, 27 Ohio St. 398.

¹ *Endicott, J., in Tarbell v. Jewett*, 129 Mass. 457, 461.

² *Tarbell v. Jewett*, 129 Mass. 457; *Freakley v. Fox*, 9 B. & C. 130; *Ipswich Man. Co. v. Story*, 5 Met. 310.

The general rule is that where a judgment debtor becomes the personal representative of the judgment creditor, the judgment is extinguished, and the debt becomes a realized asset in his hands to be accounted for in court. But this rule is subject to many exceptions; and the manner in which the representative treats this judgment debt in the course of his dealing with the estate may affect the question whether an extinguishment has actually taken place. *Charles v. Jacob*, 9 S. C. 295.

³ *Post* as to the effect of giving a legacy to one's debtor; *Wms. Exrs.* 1303, 1304; *Springer's Appeal*, 29 Penn. St. 208.

the principal of an interest-bearing debt, the interest should be treated as assets and set against the legacy;¹ the true intent of the transaction resolving, however, the question.

Where the partner of a firm or the officer of a corporation, owing the deceased a debt, becomes executor or administrator, the indebtedness becomes assets in his hands.² An administrator, who owes the estate to which he was appointed, must account for the debt; and since his appointment was not the act of the creditor, the common law never treated him as privileged like an executor in this respect.³

§ 209. **Personal Assets coming to the Knowledge but not Possession of the Representative.** — An executor or administrator is chargeable, because of the trust he has accepted, with goods and chattels of the deceased coming to his possession or knowledge; and the want of actual possession does not dispense with prudent attempts on his part to collect, enforce, or obtain possession. All the chattels of the deceased, wherever situated, are assets if the representative, by reasonable diligence, considering the means of the estate already under his control, might have possessed himself of them.⁴ If the jurisdiction afforded by his letters of authority does not enable him to obtain or collect them, it is somewhat different; and yet as to such assets, one appointed within the original jurisdiction should have ancillary letters taken out, if this course appear prudent, in order that no reasonable means may be wanting to gather in the whole of the decedent's personal estate.⁵

On the other hand, chattels of the deceased, not procured from the possession of others, and debts uncollected, do not constitute available assets in the hands of his executor or administrator, where there has not been culpable negligence or remissness on his part in the trust;⁶ though it would appear

¹ *Hallowell's Estate*, 23 Penn. St. 223.

² *Eaton v. Walsh*, 42 Mo. 272.

³ 1 Salk. 306. It was said that in case of an administrator there was, at most, only a suspension of the remedy on his appointment.

⁴ *Gray v. Swain*, 2 Hawks. (N. C.) 15; *Tuttle v. Robinson*, 33 N. H. 104.

⁵ *Supra*, § 175, as to assets out of the sovereign jurisdiction.

⁶ *Tuttle v. Robinson*, 33 N. H. 104; *Ruggles v. Sherman*, 14 Johns. 446. The general rule laid down in the old

incumbent upon such fiduciary to consider himself chargeable with all such things, and be prepared to show why he failed to collect or obtain possession of each according to its value, while in the exercise of his official functions.

§ 210. Personal Assets or not, where Decedent's Title was Qualified.—In what has been said under the present head, we have supposed the title to personal property, indeed, to be so vested in the deceased at his death, as properly to devolve at once upon his legal representatives. But where the deceased was entitled to the chattel or fund, jointly with another, so as to carry the title over to his survivor, or in common, or in partnership, or under a trust which excluded his beneficial interest,—in these and similar peculiar relations, the title not devolving upon the executor or administrator of the deceased, or devolving not with respect to the specific thing, but rather so as to constitute a claim for partition of a thing, or for sharing in the surplus of some fund yet to be ascertained, there is nothing to be considered assets, or else the assets assumes for administration a different shape, such, for instance, as an undivided interest, or a claim to some unascertained surplus.¹ All this is in general conformity with the laws which regulate the transfer and transmission of title to personal property.²

books is that an executor or administrator shall not be charged with any other goods or assets than those “which come to his hands.” But the construction placed upon this expression is such as to deprive it of literal force. See 5 Co. 33 *b*, 34 *a*; Wentw. Off. Ex. 227, 14th ed.; Wms. Exrs. 1667, 1668. The executor or administrator is, in truth, chargeable, as a sort of bailee or fiduciary, whether the things have come to his possession or not, and is personally chargeable with the value of that which belonged to the estate, and was lost or never recovered at all through his negligence. The English doctrine appears to regard the executor as a “gratuitous

bailee”; but in the United States, and where the trust is regularly compensated, it seems that his responsibility is equivalent to that of a bailee for hire. Under an appropriate head this subject will be more fully considered hereafter. See Part IV., *post*.

¹ See as to a debt or legacy going to a survivor, *Green v. Green*, 3 Sm. & M. 256; *Cote v. Dequindre*, Walk. (Mich.) 64. As to a deceased partner's interest in his partnership firm, *Platt v. Platt*, 42 Conn. 330; *Moses v. Moses*, 50 Ga. 9.

² See 2 Schoul. Pers. Prop., 1, 2, and other general works upon Personal Property.

§ 211. **Various Cases where Representative does not hold strictly as Assets.**— So, again, the principles which regulate the reciprocal title of husband and wife, whether under the old coverture rules or as embodied in statutes passed for the more especial behoof of the surviving widow, may affect the transmission of title as assets to the personal representative; depriving him of the right to take possession, or to collect, or making him a mere conduit of title to the surviving spouse, regardless of creditors of the estate.¹ And in various other instances legislators exhibit tenderness towards the distressed survivors of a family at the expense of those who have claims upon the general assets;² all of which qualifications to his authority the legal representative of an estate should duly observe.

The proceeds of a life insurance policy taken out by the decedent and expressed to be payable to another, as, for instance, to his widow or a child, or in trust for such a one's benefit, are not assets of the estate;³ though it may be that suit should be brought *pro forma* in the representative's name on behalf of the beneficiary named. But where the person insured takes out life insurance generally, and not for the express benefit of others surviving him, or where the beneficiaries named have predeceased, the fund goes properly to legal representatives for the benefit of the estate, and becomes assets for the payment of debts.⁴ Pensions and public gratuities, or pay for army and navy service, are often made payable for the direct benefit of widow, children, or parents;⁵ and public statutes, thus expressly providing for the beneficial payment of arrears to surviving members of a family, exclude the notion of general assets for creditors. There are other instances where personal property may come to the executor

¹ Schoul. Hus. & Wife, §§ 409, 414; *post* as to a widow's paraphernalia, allowances, etc.

² *Ib.* As to property exempt from administration, see Taylor v. Pettus, 52 Ala. 287; Heard v. Northington, 49 Tex. 439.

³ Senior v. Ackerman, 2 Redf. (N. Y.) 302; Cables v. Prescott, 67 Me. 582.

⁴ Hathaway v. Sherman, 61 Me. 466; Butson, *Re*, 9 L. R. Ir. 21.

⁵ Perkins v. Perkins, 46 N. H. 110. And see *post* as to distribution under modern statutes which give compensation to the widow, children, etc., of one killed, by the tort of a person or corporation.

or administrator *pro forma*, and yet be applicable only to special purposes.¹

§ 212. **Real Estate descends to Heirs; not Assets except for Deficiency.**—Real estate, at the common law, becomes vested on the death of the owner in his heirs or devisees, and the executor or administrator has no inherent power over it. Lands, therefore, are not in a primary sense assets, to be appropriated for the benefit of creditors; nor has chancery jurisdiction to decree their sale at the suit of a creditor, unless he has some specific lien or right therein.² It is only as legislation, or the will of a testator may have conferred an express power upon the executor or administrator, that he can exert it in respect of real estate, unless authority has been conferred by the heirs or devisees themselves. But modern enactments, as we shall see hereafter, usually permit the lands of a deceased owner to be subjected to the satisfaction of his just debts, in so far as the personalty falls short of paying them, and general provision is made for sale by the executor or administrator under a judicial license accordingly.³ When the necessity arises to deal with lands as assets, the heirs or devisees should have due notice, nor in any case can their beneficial rights be safely ignored.⁴

Moreover, the personal representative will only be permitted to sell so much of the land as may discharge the debts, unless, perhaps, by a partial sale the interests of the heirs and devisees would be unduly injured. And even though it should become necessary to make a sale under a license, the executor or administrator, as such, is not called upon to perfect the title or relieve the land of any burden; but he should sell as he finds it. Should there be a fictitious incumbrance on the land that would deter purchasers from

¹ Wms. Exrs. 1677; Parry v. Ashley, 3 Sim. 97; Hassall v. Smithers, 12 Ves. 119.

² Wms. Exrs. 650; Drinkwater v. Drinkwater, 4 Mass. 354; Lucy v. Lucy, 55 N. H. 9; Laidley v. Kline, 8 W. Va. 218; Hankins v. Kimball, 57

Ind. 42; McPike v. Wells, 54 Miss. 136; Le Moyne v. Quimby, 70 Ill. 399; Sheldon v. Rice, 30 Mich. 296.

³ *Ib.* See *post* as to sale of lands under license, etc.

⁴ McPike v. Wells, 54 Miss. 136.

buying, it is eminently proper for the heir or devisee, in order to protect his estate by procuring a full price, to institute proceedings for removing the incumbrance. But separate creditors against the estate acquire no such interest or specific lien on the premises as justifies such proceedings on their part, even though the sale were necessary for paying their claims.¹

§ 213. **Executor or Administrator has no Inherent Authority as to Real Estate.**—It follows generally that if the representative takes possession of the real estate of the deceased, he is accountable to the heirs as their agent, and not, strictly speaking, to the probate court in his official capacity, though for convenience he will often manage as by consent of the heirs.² Proceeds of a sale by an executor empowered under the will to sell for the benefit of legatees are not presumably to be brought into the general administration.³ The representative has no cause to recover possession of the lands of the deceased by a suit at law, and cannot maintain such a suit.⁴ And whatever means a creditor may lawfully pursue in order to render the heirs of the deceased liable with the personal representative to settle his demand, the personal assets of the estate must be exhausted before resort can be had to the realty.⁵

¹ *Le Moyne v. Quimby*, 70 Ill. 399.

² *Taylor Landl. & Ten.* § 390; *McCoy v. Scott*, 2 Rawle, 222; *Kimball v. Sumner*, 62 Me. 309; *Lucy v. Lucy*, 55 N. H. 9; *Palmer v. Palmer*, 13 Gray, 328. It is sometimes of advantage to the heirs to permit the representative to collect rents, and this course may save sometimes the sale of the real estate to pay debts. *Kimball v. Sumner*, *supra*. Inasmuch as the administrator who collects rents holds them for the heir, and not as assets for the creditors, he holds them for his own use where he himself is the heir. *Schwartz's Estate*, 14 Penn. St. 42. In Michigan and some other States the personal representative is expressly authorized by

statute to collect rents and take control of the real estate of the deceased during the settlement of the estate. *Kline v. Moulton*, 11 Mich. 370; *Wms. Exrs.* 821, and Perkins's note.

³ *Aston's Estate*, 5 Whart. 228; *Fromberger v. Greiner*, 5 Whart. 350.

⁴ *Drinkwater v. Drinkwater*, 4 Mass. 354.

⁵ *Hoffman v. Wilding*, 85 Ill. 453; sale of lands for payment of debts, *post*. In Arkansas and some other States the law is that the real as well as the personal estate of the deceased shall be treated as assets in the hands of the representative; neither species of property, however, to be sold without an order of the probate court. *Tate v.*

§ 214. **Real Estate of Mortgagor or Mortgagee; Rule of Assets.**—Where one dies seised of real estate incumbered by a mortgage, the land descends to heirs or devisees subject to that special incumbrance; in other words, the equity of redemption vests in them. If such mortgage be afterwards foreclosed and the land sold, any surplus on the sale is regarded as realty, and goes to the heirs or devisees; and the representative, as such, cannot regard it as personal assets nor sue to recover it,¹ except for the contingency of having to sell under a license, as already noticed. Generally, when land is sold for a specific purpose or under a mortgage, the surplus money, as also between the heirs and next of kin, is considered as land; but after it has once vested in the person entitled to it, it becomes money, and on his death passes to his own representatives as personal estate.²

As for the mortgagee of real estate, such mortgage before foreclosure is only security in his hands for indebtedness or a liability, and equity treats it as a chattel interest, which passes to the executor like the principal *chose in action*.³ The same doctrine applies to the assignee of a mortgage.⁴ Where lands mortgaged to the deceased are taken into possession, and foreclosed after his death by his executor or administrator for breach of condition, the executor or administrator shall hold the estate until his functions touching it are fully

Norton, 94 U. S. Supr. 746; Meeks v. Vassault, 3 Sawyer, 206. In Delaware, too, at a very early period under the proprietary government, the common law was changed in this respect; lands were made liable as well as chattels for the payment of debts, and they might be taken and sold on execution process, or sold by executors and administrators for the debts of their decedents. Vincent v. Platt, 5 Harring. 164. See also Jones v. Wightman, 2 Hill (S. C.) 579.

¹ Though the mortgage provides that the surplus shall be paid to the mortgagor or "his executors or administrators," this is the true construction to place upon the transaction. Dunning v. Ocean Nat. Bank, 61 N. Y. 497.

And see Cox v. McBurney, 2 Sandf. 561. Cf. Heighway v. Pendleton, 15 Ohio, 735.

² Sayers's Appeal, 79 Penn. St. 428; Foster's Appeal, 74 Penn. St. 391; Sweezy v. Willis, 1 Bradf. (N. Y.) 495.

³ Wms. Exrs. 687; Tabor v. Tabor, 3 Swanst. 636; Jones and other general writers on Mortgages; Chase v. Lockerman, 11 Gill & J. 185; Fay v. Cheney, 14 Pick. 399; Steel v. Steel, 4 Allen, 117; Burton v. Hintrager, 18 Iowa, 348. A Welsh mortgage follows this rule. Longuet v. Scawen, 1 Ves. Sen. 406.

⁴ Statutes sometimes emphasize the rule of the text. Mass. Gen. Stats. c. 96, § 9.

performed, or until distribution ;¹ and such property, it would appear, is to be held and dealt with like other personal assets, this being its character when the representative's title vested by reason of the owner's death.²

§ 215. **Rule of Assets as to Lands set off in Execution.** — Land set off to an executor or administrator upon an execution recovered by him on a debt which was due to the deceased personally, appears to follow the same rule as in the representative's foreclosure of a mortgage. The right of action, in other words, having once vested in the representative, whatever may be realized thereon afterwards goes properly as assets for the general benefit of the estate, being the result of a prudent pursuit or enforcement of that right ; and hence the real estate taken on execution, or its proceeds, will vest in the representative as personal assets, to be paid out or distributed eventually, and meanwhile held in trust.³

§ 216. **Rents, Profits, and Income of Real Estate; Rule of Assets.** — The profits and income of real estate, incidental to its beneficial enjoyment, follow by operation of law the title to the premises. The rents of a decedent's lands (not being apportionable at common law) go according to this principle, in the absence of local statutes providing for apportionment. The rents accruing previous to the lessor's death belong to his personal representative, and those accruing after his death to the heir or devisee.⁴

¹ *Boylston v. Carver*, 4 Mass. 598; *Palmer v. Stevens*, 11 Cush. 148; *Terry v. Ferguson*, 8 Port. 500; *Harper v. Archer*, 28 Miss. 212; *Taft v. Stevens*, 3 Gray, 504.

² Local statutes are found to affirm this rule. Mass. Gen. Stats. c. 96, §§ 9-12.

³ *Boylston v. Carver*, 4 Mass. 598; *Taft v. Stevens*, 3 Gray, 504. Local statutes confirm this rule. Mass. Gen. Stats. c. 96, §§ 9-12; *Williamson v. Furbush*, 31 Ark. 539.

⁴ *Tayl. Land. & Ten.* § 390; *Peck v.*

Ingersoll, 7 N. Y. 528; *Stinson v. Stinson*, 38 Me. 593; *Sparhawk v. Allen*, 25 N. H. 261; *Gibson v. Farley*, 16 Mass. 280; *Fay v. Holloran*, 35 Barb. 295; *Kohler v. Knapp*, 1 Bradf. 241; *Robb's Appeal*, 41 Penn. St. 45; *King v. Anderson*, 20 Ind. 385; *Foltz v. Prouse*, 17 Ill. 487; *Foteaux v. Lepage*, 6 Iowa, 123; *Smith v. Bland*, 7 B. Mon. 21; *Fleming v. Chunn*, 4 Jones Eq. 422; *Bloodworth v. Stevens*, 51 Miss. 475; *Crane v. Guthrie*, 47 Iowa, 542. So, too, where rent is payable in kind. *Cobel v. Cobel*, 8 Penn. St. 342.

§ 217. **Legal Character of Property, Real or Personal, fixed at Owner's Death; Rule of Equitable Conversion.** — In general, so far as executors or administrators are concerned, the character of property, whether as real or personal, is that impressed upon it at the death of the testate or intestate, and does not change by any subsequent conversion in the course of administration.¹ Indeed, a testator cannot alter the legal character of his real or personal property by directing that it shall be considered of the one class instead of the other.²

In equity, however, that which should have been done is treated in many instances as actually done; agreeably to which maxim, money is often to be regarded as land, and land as money; though the principle is not, apparently, pushed to the extent of allowing property to be retained in the one shape, and yet devolve in title as though it were of the other.³ An equitable conversion may take place, therefore, subsequently to the testator's death, by reason of directions contained in the will itself and properly executed. Such conversion, however, is not favored, nor extended upon inference. Accordingly, a testator's direction to convert his real estate into personalty, for specified purposes, must be restricted to those objects, and any surplus proceeds after execution of the power will go as realty;⁴ though, should it clearly appear that the testator intended an absolute conversion for all the purposes of the will, the proceeds will constitute assets in the hands of the executor, for the payment of legacies as well as of debts and funeral expenses.⁵ Again,

Except as to payment in crops not yet ripe. *Wadsworth v. Alcott*, 6 N. Y. 171. B. & C. 364; *Johnson v. Arnold*, 1 Ves. 171.

64. Accordingly, the executor of a lessor may distrain for arrears of rent due at the time of the testator's death, but not for rent which shall have accrued subsequently. *Taylor Landl. & Ten.* § 570.

¹ *Hamer v. Bethea*, 11 S. C. 416; *Rogers v. Paterson*, 4 Paige, 409.

² *Wms. Exrs.* 657; *Clay v. Willis*, 1

³ *Wms. Exrs.* 659; 1 *Jarm. Wills*, 3d Eng. ed. 551.

⁴ *Wms. Exrs.* 658; *Fletcher v. Ashburner*, 1 Bro. C. C. 497; *Hill v. Cock*, 1 Ves. & Bea. 173. And see *Foster's Appeal*, 74 Penn. St. 391; *Thomas, Petition of*, 4 *Thomp. & C. (N. Y.)* 410.

⁵ *Smith v. First Presby. Church*, 26 N. J. Eq. 132; *Hammond v. Putnam*, 110 Mass. 235; *Phelps v. Pond*, 23 N. Y. 69.

there may be a constructive conversion of real into personal, or personal into real, property, at the time of the testator's decease.¹

In the administration of an intestate estate, the rule of equitable conversion is of little or no practical consequence. But in administration under a will it may be found of much importance. In the latter instance, the general rule deducible from English and American decisions is, that, where the will shows unequivocally that the testator meant to convert real estate into personal, the law will consider the conversion as actually made at the death of the testator, and treat the estate as personal for all the purposes plainly intended by the will.² Conversely, where the testator shows a clear intention that personal estate should be converted into real, as by an explicit direction that certain money should be laid out in land and settled on A. in fee, the money is descendible at once upon the testator's death, with the usual incidents of real estate tenure.³ In either case, the death of the surviving legatee or devisee, before an actual conversion takes place, and before the administration is completed and the claims of creditors disposed of, causes a devolution of title as between his personal or real representatives, according to the character impressed upon the property by the testator's will. But an intended postponement, or an option or discretion conferred by the will upon the executors, should postpone the constructive conversion to the time when conversion, by a sale or otherwise, actually takes place.⁴

§ 218. Character of Property at Owner's Death; Instances; Contract to Sell; Land Damages; Fire-Insurance Money, etc. — Where a deed executed by the vendor of real estate is held by some third person as an escrow, to be delivered upon the payment of an unpaid balance of the purchase-money, the

¹ *Hammond v. Putnam*, 110 Mass. 232, and cases cited. Eq. 132; *Phelps v. Pond*, 23 N. Y. 69; *Craig v. Leslie*, 3 Wheat. 562.

² *Johnson v. Woods*, 2 Beav. 409; *Collier v. Collier*, 3 Ohio St. 369; *Morton, J., in Hammond v. Putnam*, 110 Mass. 36; 1 Jarm. Wills, 3d Eng. ed. 549; *Wms. Exrs.* 662, Perkins's note; *Smith v. First Presby. Church*, 26 N. J. 667; *Bramhall v. Ferris*, 14 N. Y. 41; *Phelps v. Pond*, 23 N. Y. 69; *Dodson v. Hay*, 3 Bro. C. C. 404; *Wms. Exrs.* 658, and Perkins's note.

⁴ *Bective v. Hodgson*, 10 H. L. Cas. 667; *De Beauvoir, Re*, 3 H. L. Cas. 524.

death, meantime, of the vendor will cause the estate to descend to the heirs, subject to the vendee's equitable right to a conveyance.¹ A contract for the sale of land passes, as a beneficial right for enforcement, to the executor, as between him and the heir or devisee, being personalty;² while the estate to the land vests, in equity, in the vendee, and goes to his heirs, and not to the personal representative.³ Where a testator devises land, to which he still holds the legal title, but which he has sold, giving to the purchaser a bond for a deed, the purchase-money, when paid by the purchaser, will belong to the devisee.⁴

Damages assessed in favor of land taken for public uses, before the owner's death, though not made payable until after his death, pass as assets to the executor or administrator; but otherwise, if the land was not taken until after the owner's death.⁵ So, if a person sells real estate and dies afterwards, that portion of the purchase-money which remains unpaid must be treated as personal property and assets, however the same may have been secured.⁶

Insurance money paid to the heirs on a fire insurance of the decedent's real estate, the buildings being burned after his death, vests in the heirs, like the realty, and constitutes no part of the ordinary personal assets of the deceased.⁷ But if the buildings were burned while the decedent was alive, any claim for unpaid insurance money should, on principle, constitute assets for the personal representative to collect and administer upon.

§ 219. **Gifts Causa Mortis as affecting Question of Assets.** — A gift of personal property *causa mortis*, which differs from ordinary gifts in being made with an anticipation of imminent

¹ Teneick v. Flagg, 29 N. J. L. 25. win v. Milton, 25 N. H. 458; Neal v. Escrows are to be respected. See 1 B. Knox R. Co., 61 Me. 298. & Ald. 606.

² Moore v. Burrows, 34 Barb. 173.

³ Ib.; Champion v. Brown, 6 John. Ch. 398.

⁴ Wright v. Minshall, 72 Ill. 584.

⁵ Astor v. Hoyt, 5 Wend. 603; Welles v. Cowles, 4 Conn. 182; Good-

⁶ Loring v. Cunningham, 9 Cush. 87; Henson v. Ott, 7 Ind. 512; Everit, Matter of, 2 Edw. 597; Sutter v. Ling, 25 Penn. St. 466.

⁷ Wyman v. Wyman, 26 N. Y. 253; Harrison v. Harrison, 4 Leigh, 371.

death, and constituting a sort of ambulatory disposition by delivery, without the essential formalities of a will, carries two distinct consequences, when fully executed and followed by the donor's death: one with respect to the donee himself, the other as concerns creditors of the estate. As concerns the donee, his title is derived directly from the donor and not from the donor's executor or administrator; consequently, the assent of such representative after the donor's death is not in any way essential to the donee's title, nor has the executor or administrator any claim whatever upon the property for the ordinary purposes of administration and the claims of distributees.¹ At the same time the executor or administrator of an alleged donor has corresponding rights against all persons retaining property of the deceased under the fictitious claim of donees *causa mortis*, and it is his duty to dispossess them.² But with regard to the donor's creditors, the universal principle is, as in the case of gifts *inter vivos*, that the transfer shall not be allowed to defeat the just claims of creditors;³ and accordingly, upon an utter deficiency of assets to pay the lawful claims of creditors, any gift *causa mortis* must give way so far as may be requisite to discharge lawful demands.⁴

§ 220. **Assignment, Gift, or Transfer by the Decedent, to be avoided if Fraudulent as against his Creditors.** — Any gift, assignment, conveyance, or transfer of property within the statute 13 Eliz. c. 5, and analogous legislation, is void against creditors; and, consequently, it becomes the duty of a personal representative to procure the property by instituting, on their behalf, appropriate proceedings, considering the means of litigation at his disposal and the proof obtainable.⁵ So, too,

¹ 2 Schoul. Pers. Prop. 179, 180; Gaunt v. Tucker, 18 Ala. 27; Michener v. Dale, 23 Penn. St. 59; Westerlo v. De Witt, 36 N. Y. 340. See Wadsworth v. Chick, 55 Tex. 241.

² Egerton v. Egerton, 17 N. J. Eq. 419.

³ 2 Bl. Com. 514; 2 Kent Com. 448; Dig. 39, 6, 17; 2 Schoul. Pers. Prop. 180.

⁴ Drury v. Smith, 1 P. Wms. 406; Ward v. Turner, 2 Ves. Sen. 434; Michener v. Dale, 23 Penn. St. 59; Chase v. Redding, 13 Gray, 418; Borne-man v. Sidlinger, 15 Me. 429. The general topic of gifts *causa mortis*, is fully treated in 2 Schoul. Pers. Prop. 122-182. And see Wms. Exrs. 770-783.

⁵ Wms. Exrs. 1679, and note by Perkins; Martin v. Root, 17 Mass. 222.

the personal representative may and should resist the collection of a note or demand against the estate, grounded upon a fraudulent transfer by the deceased.¹ Generally speaking, property which has been assigned or conveyed by the deceased, after the manner of a gift, confers a title upon the donee or grantee, subject to the demands of prior existing creditors of the estate. The executor or administrator, representing these and other interests against the express or implied wishes of the deceased himself, if need be, may procure all assets suitable for discharging demands of this character. But if any balance is left over, it goes, not to the next of kin, but to the donee; for the revocation of any gift for the benefit of creditors of the decedent is only *pro tanto*.²

The personal representative's right and duty to have a fraudulent transfer set aside, may extend to proceedings by bill in equity to reach real estate thus fraudulently conveyed; so far, at least, as the interests of creditors may require real property to be reached for the satisfaction of debts and the fulfilment of the duties of administration, without conflicting with the main principle upon which voluntary conveyances are treated, as within the statute prohibition above referred to; and subject, of course, to the rule which exhausts the personal assets first.³ Questions of this character properly concern the settlement of the estates of those who die insolvent.

It has sometimes been disputed whether the executor or administrator of an insolvent donor can set aside the gift; but it is clear that the creditors can pursue their own remedies, in which case the personal representative of the deceased is a proper party, so that the property when recovered may go in a course of administration. 1 Am. Lead. Cas. 43; 2 Schoul. Pers. Prop. 112; Blake v. Blake, 53 Miss. 182.

¹ Cross v. Brown, 51 N. H. 486; Welsh v. Welsh, 105 Mass. 229.

² McLean v. Weeks, 61 Me. 277; Abbott v. Tenney, 18 N. H. 109; Reade v. Livingston, 3 Johns. Ch. 481; 2 Schoul. Pers. Prop. 112, 113; Burtch v. Elliot, 3 Ind. 100. *Semble*, the expenses of

administration should be defrayed out of the fund before the donee can claim a balance. McLean v. Weeks, *supra*. An action by a representative, to recover money alleged to have been obtained under a lease assigned the defendant by the decedent in fraud of his creditors, is cognizable at law. Doe v. Clark, 42 Iowa, 123. Our local practice, in other words, as to gifts *inter vivos* follows the course so frequent in the essentially distinct case of a gift *causa mortis*, namely, to permit the executor or administrator, as *quasi* representative of the creditors, to recover the property or its value to the extent requisite. *Ib.*

³ Wms. Exrs. 1679, 1680; 3 B. & Ad. 362.

§ 221. **Equitable Assets as distinguished from Legal Assets.**—The English law of administration has taken some pains to discriminate between *legal assets* and *equitable assets* of an estate; referring to the latter head, such assets as are liable only by the help of a court of equity, and not recognized as assets at law. The point of the distinction lies in this: that courts of equity disapprove those rules of priority among creditors which were early established by the common-law tribunal, and ranked all debts alike, whether founded in specialty or simple contract, this being most consonant to natural justice.¹ To stretch judicial power arbitrarily, however, in order to further ends which it lies rather within the province of legislation to accomplish, is incompatible with American rules of procedure; and American courts of equity rarely, if ever, enforce such a distinction; the old rules of priority having, instead, been altered by suitable enactments in most parts of the United States, or else rendered as tolerable as possible by being administered with uniformity.² In England, moreover, the chancery courts appear to have abated some of their former pretensions in this respect, by conceding latterly, though not without reluctance, that an equity of redemption in chattels, real or personal, constitutes assets at law in the hands of the executor or administrator for whatever it is worth over and above the security;³ or in other words, that whatever devolves in title upon the executor or administrator, by virtue of his office, shall be treated as legal assets.⁴ But with regard to such property of the deceased as consists of the proceeds of the sale of real estate, the English rule appears to settle that such proceeds are equitable and not legal assets; though there has been some question whether devises of land to executors for sale, or the payment of debts and legacies, impress the proceeds with the character of equitable assets.⁵ It is ruled conformably to

¹ Wms. Exrs. 1680–1685.

² See *c. post* as to payment of debts; Sperry, Estate of, 1 Ashm. 347.

³ Wms. Exrs. 1682; Sharpe v. Scarborough, 4 Ves. 541; Wilson v. Fielding, 2 Vern. 763. *Contra*, Cox, Credi-

tors of, 3 P. Wms. 342; Hartwell v. Chitters, Ambl. 308.

⁴ Story Eq. Jur. § 551; Wms. Exrs. 1682; Cook v. Gregson, 20 Jur. 510.

⁵ Clay v. Willis, 1 B. & C. 364; Bain v. Sadler, L. R. 12 Eq. 570; Wms.

the main distinction, that, where assets are partly legal and partly equitable, equity cannot take away the legal preference on legal assets, and yet may postpone a creditor who has been partly paid out of the legal assets, so as to make an equal satisfaction out of the equitable assets for all the creditors.¹ In the United States, and apparently in England, also, the better rule is that a right of equity of redemption in property, real or personal, should be treated as assets available, like any other legal assets of the estate;² if, indeed, the distinction between legal and equitable assets be tenable at all.

§ 222. **Assets where Property is appointed under a Power.** — Where a person has a general power of appointment, either by deed or by will, and executes that power, the property appointed is deemed in equity part of his assets, and rendered subject to the demands of his creditors in preference to the claims of his voluntary appointees or legatees.³

Exrs. 1684. *Contra*, *Girling v. Lee*, 1 Vern. 63.

¹ *Chapman v. Esgar*, 1 Sm. & G. 575.

² 4 Kent Com. 162; *Cook v. Gregson*, 20 Jur. 510, *per* Kindersley, V. C. Such, after all, is the judicial inclination not to violate general rules for the settlement of estates, that later English chancery cases appear compelled to draw the distinction between legal and equitable assets into a fine thread. Thus, Kindersley, V. C., observes, in *Shee v. French* (3 Drew. 716), that the question whether assets are legal or equitable depends on this: whether, if the case were before a court of law, on an issue of *plene administravit*, that court would treat the property as assets; for the principle on which a court of law proceeds is to inquire whether the property came to the hands of the executor *virtute officii*; if it did, the court of law regards it as assets applicable to the payment of the testator's debts, and then a court of equity treats it as legal assets.

³ "The rule perhaps had its origin,"

observes Gray, C. J., in a recent Massachusetts case, "in a decree of Lord Somers, affirmed by the House of Lords, in a case in which the person executing the power had in effect reserved the power to himself in granting away the estate. *Thompson v. Towne*, Prec. Ch. 52; s. c., 2 Vern. 319. But Lord Hardwicke repeatedly applied it to cases of the execution of a general power of appointment by will of property of which the donee had never had any ownership or control during his life; and while recognizing the logical difficulty that the power, when executed, took effect as an appointment, not of the testator's own assets, but of the estate of the donor of the power, said that the previous cases before Lord Talbot and himself (of which very meagre and imperfect reports have come down to us) had established the doctrine, that when there was a general power of appointment, which it was absolutely in the donee's pleasure to execute or not, he might do it for any purpose whatever, and might appoint the money to be paid to his

§ 223. **Chattels Real as Assets; Leases, etc.** — Inasmuch as the personal but not the real estate of the decedent vests as assets in his executor or administrator, a clear idea should be retained of the peculiar discrimination which our common law makes between these two grand classes of property. Mobility and immobility appear to be the fundamental test in all systems of jurisprudence; but at the common law there was the freehold estate in lands, which might be either one of inheritance or for life, while to all inferior interests and movables proper was applied the term “chattel”; so that personal property at our law has been essentially property the residuum of the freehold, and divided into chattels real and chattels personal.¹ Chattels real vest consequently in the executor or administrator of the lessee, whether as a valuable beneficial and assignable interest, or as involving rather a burdensome obligation to be discharged out of the decedent’s estate. Of chattels real the only important one in modern times is the lease.² The good-will of an established business and a lease-

executors if he pleased, and, if he executed it voluntarily and without consideration for the benefit of third persons, the money should be considered part of his assets, and his creditors should have the benefit of it.” *Clapp v. Ingraham*, 126 Mass. 200, 202, citing *Townshend v. Windham*, 2 Ves. Sen. 1; *Caswall, Ex parte*, 1 Atk. 559, 560; *Pack v. Bathurst*, 3 Atk. 269. “The doctrine,” adds Gray, C. J., “has been upheld to the full extent in England ever since.” *Ib.*, citing *Fleming v. Buchanan*, 3 De G. M. & G. 976; 2 Sugd. Powers, 7th ed. 27. Although the soundness of the reasons on which the doctrine rests has since been impugned *arguendo* by Gibson, C. J., and doubted by Mr. Justice Story (see *Story Eq. Jur.* § 176, and note), it has been considered well settled in the United States. *Clapp v. Ingraham, supra*; 4 Kent Com. 339, 340; *Johnson v. Cushing*, 15 N. H. 298; *Commonwealth v. Duffield*, 12 Penn. St. 277, 279–281. See also *Wms. Exrs.* 1686.

¹ 1 Schoul. Pers. Prop. 29, 30; 2 Bl. Com. 385, 386; *Wms. Exrs.* 670–690.

² *Murdock v. Ratcliff*, 7 Ohio, 119; *Wms. Exrs.* 674; 1 Schoul. Pers. Prop. 45, 73; *Lewis v. Ringo*, 3 A. K. Marsh. (Ky.) 247. Chattels personal, upon which the term “personal property” is more commonly bestowed, have already been considered. See also, as to the English attendant terms of years, mortgaged for family trust arrangements, 1 Schoul. Pers. Prop. 71. The assignee of a lessee for life holds an estate *pur autre vie*, which, by our statute, is a freehold during the assignee’s life; but on his death a chattel real and assets in the hands of his administrator. *Mosher v. Youst*, 33 Barb. 277. An estate for another’s life, which at common law fell on the grantee’s death to the first person who could get it, is affected by stat. 29, Car. II. c. 3, § 12, which favored treating it as assets of the grantee’s estate. It may be disposed of by will, however, under stat. 1 Vict. c. 26, § 3. See *Wms. Exrs.* 681, 682.

hold interest go often together as valuable assets.¹ So, too, the good-will of a renewal of the lease should, if valuable, be included.² As assets, leases have, however, peculiar incidents.

Rent may issue out of lands and tenements, or it may be paid in consideration of real and personal property blended, as where a furnished house is let.³ If the administrator of a deceased tenant takes possession of a leased estate and continues on under the terms of the lease, the profits of the land, it is said, are first liable for the payment of the rent, and only what remains can constitute assets of the estate.⁴ This rule appears an equitable one. But under the New York statutes it is held that where one dies holding leases upon which arrears of rent are due, and there were also certain sums due him for storage of goods on the leased premises, assets exist to be applied among creditors without any preference in favor of the lessor.⁵

§ 224. **Chattels which come by Remainder as Assets.** — Chattels which never vested in possession in the testator may nevertheless come to his executor by remainder as assets; as if a lease should run to A. for life, with remainder to his executor for years.⁶

§ 225. **Things on the Border-Line of Real and Personal; Rule of Assets applied to Heirlooms.** — Finally we come to things at the border-line which separates real estate and personal or chattel property at the common law. The three classes here noticeable are (1) heirlooms, (2) emblements, and (3) fixtures.

¹ Wiley's Appeal, 8 W. & S. 244.

² Green v. Green, 2 Redf. (N. Y.) 408. Where a lessee hired premises by parol agreement, a lease being drawn up but not signed, and entered before his death, and made valuable improvements, the lease is enforceable in equity, and should therefore be deemed an asset for the whole term. *Ib.*

A lease for ninety-nine years is a chattel real (in absence of statute changes), and constitutes, on the lessee's

death, assets for administration. *Faler v. McRae*, 56 Miss. 227.

³ Mickle v. Miles, 1 Grant (Pa.) 320, 328, *per* Lowrie, J. See *supra*, § 216, as to rent.

⁴ Mickle v. Miles, 1 Grant (Pa.) 320.

⁵ Harris v. Meyer, 3 Redf. (N. Y.) 450. See *post*, Part IV., as to the peculiar rights and liabilities of the personal representation with reference to chattels real.

⁶ Com. Dig. Assets C; Wms. Exrs. 1658.

Heirlooms are not favored in American law; and so far as such things cannot be treated as strict fixtures, their title seems to have been excepted from the ordinary rules of devolution upon death, out of favor to the heir, in accordance with some local custom which gratified family pride.¹ The armor and insignia of an ancestor, family portraits, crown jewels, and the like, came within the principle of this exception. According to Coke, articles of less dignity, like the best bed, table, pot, pan, and cart, might go in this manner; and out of regard to a sort of connection with the freehold, if not annexation, which they bore, keys, title-deeds, and other muniments of the inheritance, together with the chest containing them, went also to the heir.² To all this curious learning American courts pay little heed; but whatever may be pronounced heirlooms go with real estate to the heir, and the executor or administrator cannot treat them as assets more than the real estate itself. Indeed, it is held that though the owner might have disposed during life of chattels which would otherwise descend as heirlooms, he cannot devise or bequeath them by his will, but they shall vest in the heir on the instant of the donee's death.³

§ 226. **Rule of Assets applied to Emblements.** — Next, as to "emblements," a word associated with chattels vegetable and growing crops. Here the rule is, that when the owner of real estate dies, trees, and their fruit and produce, if hanging on the trees at the time of his death, also hedges and bushes, go to the heirs and not to the executor or administrator; the reason being that they are part of the real estate and not chattels.⁴ But out of favor to agriculture, and to aid the intentions of one who has bestowed labor upon a crop which by reason of some unforeseen contingency beyond his con-

¹ 1 Schoul. Pers. Prop. 117; 2 Bl. Com. 427; Wms. Pers. Prop. 5th Eng. ed. 12.

² *Ib.*; Co. Lit. 18 b; *Upton v. Lord Ferrers*, 5 Ves. 806; *Harrington v. Price*, 3 B. & A. 170; *Allwood v. Heywood*, 11 W. R. 291.

³ *Tipping v. Tipping*, 1 P. Wms. 730;

1 Schoul. Pers. Prop. 118. The topic of heirlooms is discussed at length in 1 Schoul. Pers. Prop. 117-123.

⁴ 1 Schoul. Pers. Prop. 125; *Swinb. pt. 7, § 10, pl. 8*; *Wms. Exrs.* 707; *Rodwell v. Phillips*, 9 M. & W. 501; *Maples v. Milton*, 31 Conn. 598.

trol, the unsevered property is sometimes treated as though already severed; a rule which obtains with much force as between tenant and landlord, where the tenancy has suddenly determined by act of God or the act of the law.¹ If an owner sows his land, and then conveys it away, he passes the title to growing crops as well as the soil, and his executors and administrators have no concern in either.² So, too, one's devise of land carries presumptively the growing crops.³ Crops of the year not actually sown or planted by the decedent do not come within the benefit of the rule of emblements;⁴ nor, as a rule, growing clover or grass, which is a natural product of the soil renewed from year to year.⁵

But as to grain, corn, potatoes, or any other product of the soil which is raised annually by labor and cultivation, and returns periodical profit only by periodical planting, the labor bestowed affords reason, on the casualty of death happening, for application of the rule of emblements; hence, such growing crop of a decedent goes as personal assets to his executor or administrator, and not with the title to the land.⁶

Where one grants away trees growing on the soil, they go to the grantee's executor or administrator whether felled or not; and where one grants land with express reservation of the trees, the trees go to the grantor's executor or administrator; for under these peculiar circumstances the grant itself makes a constructive severance, so as to render the trees transmissible as personal property.⁷

¹ 1 Washb. Real Prop. 104 *et seq.*; 1 Schoul. Pers. Prop. 128-134.

² 1 Schoul. Pers. Prop. 130; 1 Washb. Real Prop. 104; Foote v. Colvin, 3 Johns. 216.

³ Shofner v. Shofner, 5 Sneed, 94; Fetrow v. Fetrow, 50 Penn. St. 253. As to crops growing on a household farm, see Budd v. Hiler, 27 N. J. L. 43.

⁴ Gee v. Young, 1 Hayw. (N. C.) 17; Rodman v. Rodman, 54 Ind. 444.

⁵ Kain v. Fisher, 6 N. Y. 597; Evans v. Inglehart, 6 Gill & J. 188; 1 Schoul. Pers. Prop. 128. And this rule appears rigidly to apply even though the natural

product be increased by actual cultivation. *Ib.* But see Wms. Exrs. 712.

⁶ Penhallow v. Dwight, 7 Mass. 34; Humphrey v. Merritt, 51 Ind. 197; Wadsworth v. Allcott, 6 N. Y. 64; Thornton v. Burch, 20 Ga. 791; Singleton v. Singleton, 5 Dana, 92; Wms. Exrs. 711; Evans v. Roberts, 5 B. & C. 832; Gwin v. Hicks, 1 Bay (S. C.) 503. Local statutes are found on this subject. Green v. Cutright, Wright (Ohio) 738; Thompson v. Thompson, 6 Munf. 514.

⁷ Hob. 173; 4 Co. 63 b; Wms. Exrs. 708. *Contra* if the grantee of trees

§ 227. **Rule of Assets applied to Fixtures.**—Of these mixed things, the most important class at the present day is that of “fixtures”; the very word, now so common in legal parlance, being of modern origin and variously defined, but, on the whole, signifying chattels annexed in a manner to the ground, concerning which the right to remove comes in controversy. The object and purpose of the annexation must be considered in all cases of fixtures; and the law is less or more liberal, according as it appears that the chattel was affixed for purposes of trade, for purposes of ornament, or for domestic purposes. In order to constitute annexation within the rule of fixtures, the article in question must have been let into or united with the land or to substances previously connected with it; for mere juxtaposition, such as laying a pile of lumber on the ground, leaves the lumber mere personal property.¹ Chattels lying on the ground, at the death of the owner, vest, of course, in his executors and administrators as personal assets; while the land itself, and permanent erections thereon, go to the heir or devisee. But annexation is not a conclusive test; since there are things, such as doors, blinds, and shutters, which pass with the soil or buildings, from regard to their own nature and adaptation to the purpose for which they have been used, though so slightly annexed as to be easily removed; and on the other hand, heavy articles like mirrors, pictures, and wardrobes, fastened into the wall, which, out of corresponding regard, are to be treated still as chattels.² Various considerations are to be applied in determining whether the right to take away, under the law of fixtures, shall or shall not be granted in a particular case.

should unite thereto the purchase of the land, and not cut the trees. 4 Co. 63 b.

¹ 1 Schoul. Pers. Prop. 135–137; Amos & Fer. Fixtures, 2, 3; Elwes v. Maw, 3 East, 32; s. c., 2 Smith's Lead. Cas., Am. Notes, 228; Wms. Exrs. 728 *et seq.* Rails in stacks are personal property, and the title vests in the personal representative of the deceased. Clark v. Burnside, 15 Ill. 62.

² Winslow v. Merchants' Ins. Co., 4 Met. 314; 1 Schoul. Pers. Prop. 139; 2 Smith Lead. Cas. 239, 251, Hare & Wall. notes; Sheen v. Rickie, 5 M. & W. 175. Manure taken from the barnyard of a homestead and piled upon the land is part of the realty, and does not go to the personal representative. Fay v. Muzzey, 13 Gray, 53; Plumer v. Plumer, 30 N. H. 558. Cf. Aleyn, 32; Wms. Exrs. 731.

To classify, however, as in the leading cases on this somewhat abstruse subject, there are two kinds of disputes which may concern the representative of a deceased person: first, where controversy arises between him and the heir or devisee; second, where it is between him and the remainder man or reversioner. As to disputes of the first kind, the cardinal rule is, that the right to fixtures (presuming the person to have died who annexed the chattels) shall be most strongly taken in favor of the heir or devisee as against the executor or administrator.¹ The "incidents of a house," so to speak, are presumed to pass with the inheritance; and of fixtures employed by the deceased in trade, encouragement to trade is not a doctrine to be invoked for the mere benefit of assets and administration.² Concerning ornamental fixtures, the rule, though anciently strict in favor of the inheritance, appears to have relaxed, latterly, so as to give, at least, hangings, pictures, and mirrors fastened in the ordinary manner and easily detached, as well as portable furnaces, stoves, and ornamental chimney-pieces, to the personal representative, as chattels personal and assets.³ In some parts of the United States, as in New York, the legislature gives, on behalf of the executor, a more equal presumption in such controversy;⁴ and as the kindred to take, whether by descent

¹ 1 Schoul. Pers. Prop. 140, 141; Shep. Touch. 469, 470; Colegrave v. Dias Santos, 2 B. & C. 76; Fay v. Muzzey, 13 Gray, 53. Hop-poles in use for growing hops at the time of the owner's death pass with the real estate. Bishop v. Bishop, 11 N. Y. 123. The same favor, it appears, should be extended to a devisee as to an heir; though the discussion arises usually with reference to the latter. In the case of a devisee, however, the true intention of the will is an element which might affect the presumption under some circumstances. Wood v. Gaynon, 1 Ambl. 395; Birch v. Dawson, 2 Ad. & El. 37.

² *Ib.*; Fisher v. Dixon, 12 Cl. & Fin. 312; Amos & Fer. Fixtures, 154 *et seq.*

³ Squier v. Mayer, 2 Freem. 249;

Wms. Exrs. 732-739; Beck v. Rebow, 1 P. Wms. 94; 1 Schoul. Pers. Prop. 141-143; Blethen v. Towle, 40 Me. 310. But a heavy stove or furnace, or a grate so set into the house as not to be readily removed without disturbing brickwork and masonry, cannot be taken by the administrator as against the heir. Tuttle v. Robinson, 33 N. H. 104; Rex v. St. Dunstan, 4 B. & C. 686.

⁴ 2 Kent Com. 345; 1 Schoul. Pers. Prop. 143; House v. House, 10 Paige, 157. Chandeliers, gas-fixtures, and a private apparatus for generating gas will pass to the heir, it is held, as against the executor or administrator. Lawrence v. Kemp, 1 Duer, 363; Johnson v. Wiseman, 4 Metc. 357; Hays v. Duane, 11 N. J. Eq. 84, 96, *per* Williamson, Ch.

or distribution, are nearly identical in this country, less dispute need arise than in England, where the inheritor of land in a family is treated with favor in various ways. When such disputes exist, the usual rule applies, that the status of the property at the owner's death must determine its nature and the consequent devolution of title.¹

As between the executor of a life tenant and the remainder man or reversioner, the common law appears to favor the soil rather less, and the representative desiring to annex rather more; for here are not antagonizing claims of title, as between realty and personalty, but the landed interest of one under a will is compared with that of another, the court desiring to carry out the testator's intent. In this case, to do full justice to the estate of a life tenant, erections for trade as well as domestic purposes have been permissively disannexed on the life tenant's death, for the benefit of his estate. The case, though not quite so strong as between landlord and tenant (to use Lord Hardwicke's expression), is governed by the same reasons.² But where chattels remain on the premises, disannexed, at the death of one tenant for life, the next tenant for life cannot prejudice or affect the rights to vest at his death, by attaching them to the freehold.³

§ 228. **Rule as to Foreign Assets.** — The fundamental principle upon which personal property, corporeal or incorporeal,

But chandeliers, brackets, and other things readily detachable, and sold elsewhere, are certainly not part of the realty, nor presumably sold or let with a house under all circumstances; *aliter*, as it seems with the running gas and water pipes, in controversies of the present kind. See *Vaughen v. Haldeman*, 33 Penn. St. 522; *Montague v. Dent*, 10 Rich. 135.

¹ *Bishop v. Bishop*, 11 N. Y. 123, is a case where hop-poles stood in the ground for use at the testator's death, but were afterwards taken up for the purpose of picking the hops and heaped in the yard.

² Lord Hardwicke in *Dudley v. Warde*, Ambl. 113. See also 1 H. Bl. 260, *n.*; *Elwes v. Maw*, 3 East, 54; 2 Smith Lead. Cas. 245; 1 Schoul. Pers. Prop. 144; Wms. Exrs. 741-743.

³ *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382. Pews in church are by the common law real estate, and the title goes accordingly; but in some States they are made personal property by statute. 1 Schoul. Pers. Prop. 158; *McNabb v. Pond*, 4 Bradf. (N. Y.) 7. As to fixtures in general, see 1 Schoul. Pers. Prop. 135-160; Amos & Ferard on Fixtures.

including rights of action, whose situation is in some different sovereign jurisdiction, may be regarded as assets, we have already had occasion to discuss.¹

¹ *Supra*, § 175.

CHAPTER II.

INVENTORY OF THE ESTATE.

§ 229. **Inventory required formerly in England; Custom Fallen into Disuse.**—By an English statute, enacted during the reign of Henry VIII., every executor or administrator was required to file with the ordinary a sworn inventory of “all the goods, chattels, wares, merchandises, as well movable as not movable,” of the deceased.¹ Statute 22 & 23 Car. II. c. 10, § 1, made the return of an inventory of the “goods, chattels, and credits of the deceased, come to his possession,” at or before a specified day, a condition of each administration bond.² Probably, however, from a much earlier period, the practice of the English spiritual courts strenuously prescribed this duty, with the countenance of temporal tribunals.³ It was a breach *per se* of the administration bond to neglect filing an inventory by the time specified; and in some county jurisdictions an executor had to exhibit his inventory before probate would be granted him.⁴

Nevertheless, the custom of filing an inventory has fallen quite into disuse in modern English practice. The bond given under the Court of Probate Act is conditioned to make an inventory when lawfully called on, and to exhibit the same whenever required by law to do so;⁵ in other words, unless the representative is cited in, he incurs no official obligation in the matter; and to such a conclusion the spiritual practice seems to have been forced before this act was passed.⁶ But

¹ Stat. 21 Hen. VIII. c. 5, § 4. See Wms. Exrs. 974, for the full text of the statute requirement.

² Wms. Exrs. 529, 974.

³ The effect of neglecting to file an inventory exposed the executor in all courts to an imputation, sometimes conclusive, of waste, should the assets prove insufficient. Orr v. Kaines, 2 Ves. Sen. 193; Swinb. pt. 6, §§ 6–9.

⁴ Wms. Exrs. 975; 1 Phillim. 240.

⁵ Wms. Exrs. 532, 974–976.

⁶ Wms. Exrs. 976; 1 Phillim. 240. But in some cases the court might *ex officio* require an inventory to be brought in, and it is prudent for the administrator or executor to exhibit it before finally settling the estate. 1 Phillim. 240; 1 Hagg. 106.

the English theory is still to compel an executor or administrator to exhibit an inventory on the petition of any person in interest, or even of one who appears to have an interest;¹ and the instance is very rare where such a petition will be refused, if presented within a reasonable time.²

§ 230. **Inventory required in American Practice; whether Indispensable.**—The inventory is a settled feature of probate practice in the United States. And as the American probate theory, favoring public registry in such matters, is, that the legal representative,—unless a residuary legatee who elects to oblige himself simply to pay all debts and legacies and run the risk of assets,—shall render accounts of his administration, his first duty, as relates to the court, is, after obtaining his credentials, to prepare and file an inventory of the assets of the deceased; such inventory to serve as the basis of his probate accounts. The bonds of executors and administrators are accordingly conditioned, in all or most of the leading States, to return an inventory to the probate court or registry within a specified period from the date of qualification. Thus, under the Massachusetts statute, the judge of probate issues an order, usually on the day when the executor or administrator qualified, and upon his verbal request, to three suitable disinterested persons; these appraisers having been sworn to the faithful discharge of their trust, appraise the estate of the deceased upon the inventory blank which accompanies the order, filling up schedules, and delivering the document, when completed, to the executor or administrator, by whom it should be returned to the probate office for record with his own oath that the list is just and perfect.³ Similar legislation is to be found in Wisconsin and various

¹ A probable or contingent interest entitles one to petition for an inventory; so, too, the claim, though disputed, of a creditor. Wms. Exrs. 976, and cases cited; 2 Cas. temp. Lee, 251, 344; 1 Philim. 240; Gale v. Luttrell, 2 Add. 234.

² Wms. Exrs. 979, 980. It has been refused where assets sufficient for the petitioner's purpose are admitted by the

representative, or where double remedies are being pursued for attaining this result. Wms. Exrs. 978; 2 Cas. temp. Lee, 101, 134, 356.

³ Mass. Gen. Stats. c. 96, § 2; Smith (Mass.) Prob. Pract. 103. The verification appears to be based upon the ecclesiastical practice. Gary Prob. Pract. 121.

other States at the north-west;¹ also in New York, where (as under English statutes²) two appraisers suffice, and the appraisal is to be made in duplicate and upon previous notice given to legatees and next of kin resident in the county, so that they may attend when it is made, if they desire.³

Three months is usually the prescribed period within which an executor or administrator should return his inventory to the court or registry whence his appointment came. In some States only one inventory is required, and for additional property coming to his possession or knowledge, as well as income and accretions, the executor or administrator is bound only to account;⁴ but the New York statute provides for filing a supplemental inventory in such a case.⁵ Filing a second inventory to correct errors of the first is sometimes permitted.⁶ But where no property has come to his hands, the representative may dispense with the formality and cost of an inventory;⁷ and so, too, it is held, where there were no assets left to exhibit to appraisers, but all the assets had been justly used in paying the funeral expenses and debts.⁸

The failure to return an inventory does not necessarily render the executor or administrator personally liable for the

¹ Gary Prob. Pract. § 318.

² Wms. Exrs. 974.

³ Redfield's (N. Y.) Surr. Pract. 214. Clerks and persons employed in a probate office are excluded by local statutes more or less specifically worded, and such exclusion is founded in sound reasons of policy. Appraisers are allowed compensation; and various abuses have sprung up where the probate office is permitted to compete with professional men and the public for private fees and emoluments in connection with the settlement of estates, of which they keep the records.

The English statute 21 Hen. VIII. c. 5, § 4, prefers interested to disinterested persons, *i.e.*, creditors, legatees, or next of kin. Wms. Exrs. 974. But appraisement is not made in modern English practice pursuant to the letter of the statute. Wms. Exrs. 981.

⁴ Hooker v. Bancroft, 4 Pick. 50.

⁵ Redfield's (N. Y.) Surr. Pract. 215; 4 Redf. (N. Y.) 489. See also the Connecticut statute. Moore v. Holmes, 32 Conn. 553; and as to the Pennsylvania rule, Commonwealth v. Bryan, 8 S. & R. 128.

⁶ Bradford's Admr. 1 Browne, 87.

⁷ Walker v. Hall, 1 Pick. 20.

⁸ Robbins, Matter of, 4 Redf. (N.Y.) 144. It seems that in such a case the court may require of the representative a sworn statement of the property that came to his hands, its value, its disposition, and the use made of the proceeds. *Ib.*

An executrix need not file an inventory of property held by herself as life-tenant under the will. The right of a remainder man to demand an inventory depends upon allegation of waste. Brooks v. Brooks, 12 S. C. 422.

assets; nor does the omission of any particular debt from the inventory items make him absolutely chargeable with it; but the question is essentially one of culpable negligence or misconduct on his part, occasioning a loss.¹ Nevertheless, the failure to file an inventory by the time specified, as American statutes run, amounts technically to a breach of the condition of the bond, which may or may not prove serious in its consequences, but rarely can, if upon citation the executor or administrator performs this duty, or shows good reason why an inventory should be deferred or dispensed with.² In some, but not all, of our States, there are express statute provisions for summoning the delinquent representative to return his inventory, or else show cause why attachment should not issue; also, upon reasonable cause appearing, for granting him further time within which to make such return.³

§ 231. **Dispensing with an Inventory after Lapse of Time.** — Time alone constitutes no bar against the requirement of an inventory, where the statute fails explicitly to sanction the omission. But if a long period has elapsed, such as forty years, a presumption might arise either that the estate had been fully settled or that there were no assets available;⁴ and time, in connection with other circumstances, may operate much sooner to dispense with filing an inventory.⁵

¹ *Leake v. Beanes*, 2 Har. & J. 373; *Moses v. Moses*, 50 Ga. 9, 30; *Connelly's Appeal*, 1 Grant (Pa.) 366; *Stearn v. Mills*, 4 B. & Ad. 657.

² *McKim v. Harwood*, 129 Mass. 75; *Adams v. Adams*, 22 Vt. 50; *Lewis v. Lusk*, 35 Miss. 696. Damages may be assessed for failure to make and return an inventory. *Scott v. Governor*, 1 Mo. 686. See *Potter v. Titcomb*, 1 Fairf. 53; *Bourne v. Stevenson*, 58 Me. 499. Such neglect may support a charge of maladministration against the representative. *Hart v. Ten Eyck*, 2 Johns. Ch. 62.

³ Redf. (N. Y.) Surr. Pract. 215. As in English practice, the application for a summons to file an inventory may be made by any one interested in the estate;

e.g., an apparent creditor. *Forsyth v. Burr*, 37 Barb. 540. The court may summon at its own instance, though this is seldom done. *Thomson v. Thomson*, 1 Bradf. 24.

⁴ *Ritchie v. Rees*, 1 Add. 144.

⁵ See *Wms. Exrs.* 979; *Bowles v. Harvey*, 4 Hagg. 241; *Scurrah v. Scurrah*, 2 Curt. 919. See further *post* as to dispensing with an account. Calling for an account in connection with, or by way of substitution for, an inventory, brings up this issue more plainly. A sworn declaration instead of an inventory, setting forth desperate debts, may suffice often to discharge the representative where no valuable assets ever came to his possession or knowledge. See *Higgins v. Higgins*, 4 Hagg. 242.

§ 232. **Qualified Representative not exempt from rendering an Inventory.** — It is not in probate practice the original executor or administrator alone, or an administrator with the will annexed, who is bound to make and return an inventory. An administrator *de bonis non* should inventory such estate of the deceased remaining unadministered as may have come to his possession or knowledge.¹ So, too, the representatives of a deceased executor or administrator are compellable, at the discretion of the court, to bring in an inventory, as well as a final account, on behalf of the delinquent testate or intestate.² Other instances are found in English reports in which inventories have been officially required;³ and, as Williams observes, the ecclesiastical court discouraged all hanging back with respect to the production of an inventory when called for, and generally condemned the contumacious costs besides.⁴ In American practice, the bonds of all executors, administrators, probate guardians, and testamentary trustees, are usually conditioned to return an inventory;⁵ and without an inventory valuation as a basis, they cannot readily prepare their accounts in due form.

§ 233. **What the Inventory should contain.** — According to English practice, the inventory should contain a full description and valuation of all the personal property to which the executor or administrator became entitled by virtue of his office; this document being in effect a list of the assets for which he stands chargeable, taken at their just worth.⁶ What these assets are we showed in the preceding chapter; and chattels, real and personal, animate and inanimate, corporeal and incorporeal, answering to that description, are to be included. Such, too, is the doctrine generally prevalent in the United States; but while in some parts of this country only personal property of the deceased should be inventoried, the

¹ Wms. Exrs. 979.

lite. Wms. Exrs. 980; 1 Cas. temp.

² *Ib.*; Ritchie v. Reese, 1 Add. 158; Gall v. Luttrell, 2 Add. 234.

Lee, 15; 2 Cas. temp. Lee, 131.

³ *E.g.*, from administrators *durante minoritate* and administrators *pendente*

⁴ Wms. Exrs. 980; 1 Phillim. 241, 243; 2 Phillim. 364.

⁵ See Smith (Mass.) Prob. Pract. 101.

⁶ Wms. Exrs. 980.

legislatures of other States insist that his real estate shall also be appraised, two separate schedules being made, and the schedule of personal property alone serving as the basis of the executor's or administrator's accounts.¹ The latter practice appears the more convenient, as affording record proof of all the assets, actual or potential, upon which creditors and legatees may rely; and, under a will which confers the power to manage and control the testator's real estate, or where, as some local statutes provide, the representative has a general right of possession of the real estate while the estate is being settled, there are reasons especially urgent why real property should be scheduled.

An inventory should be specific in its enumeration of the effects of the estate; not necessarily minute, of course, and yet so as to separate large items of value, and set out by themselves such special classes as chattels real, household furniture, cattle, stock in trade, cash, and securities of the incorporeal sort, such as notes and bonds, all of which fall under the denomination of personal property and assets.² If property found among the effects of the deceased, and coming to the possession of the representative, is claimed by others under a title not yet established, it seems prudent to include this item in the list, with words or a memorandum indicating doubt as to the representative's own title.³ Bonds and investment securities should be stated at their current market value, or possibly, in some convenient instances, at par; provided, in the latter instance, that the representative carefully regard the fair premium in dealing and disposing of them, so that those interested shall have the benefit shared justly.⁴ Debts and incorporeal choses of a doubtful, desperate, or worthless character should be so denominated. Real estate should be specified by parcels.⁵

¹ See *supra*, § 198; Smith's (Mass.) Prob. Pract. 102; Gary Prob. Pract. § 330, citing statutes of Minnesota and Wisconsin. Cf. *Henshaw v. Blood*, 1 Mass. 35.

² *Vanmeter v. Jones*, 3 N. J. Eq. 520.

³ *Waterhouse v. Bourke*, 14 La. Ann. 358; *Gold's Case*, Kirby (Conn.) 100.

⁴ If set forth at par, the inventory should so state the fact.

⁵ See *Adams v. Adams*, 20 Vt. 50; *Wms. Exrs.* 981. Appraisal at the market value, as nearly as can be ascertained, whether above or below par, appear to be the rule as to marketable investment securities. Gary Prob. Pract.

An inventory is, after all, but *prima facie* evidence of the true value of assets, and prudence and good faith is the test of the representative's responsibility in dealing therewith; so that whether more happens to be actually realized, or less, or the title fails altogether, the exercise of reasonable diligence and honesty on his part is all that the law can exact from the executor or administrator. Such being the result, all discrepancies may be corrected in a representative's accounts, and debit or credit given accordingly. Hence, too, the valuation in the inventory by one standard or another appears to be of less consequence than a consistent valuation by the particular standard as therein exhibited plainly; for values, and especially those of various marketable stocks and securities, may fluctuate from day to day, so as to furnish no absolute criterion of accountability. Similar considerations apply to accruing profits, and the interest and income of personal property left by the deceased. Such accretions might well be included up to the date of appraisal, though not later; or, perhaps, might be left out altogether, as is not infrequent; but by whichever standard reckoned, any inventory must be very far from affording a perfect statement of profits, interest, and income as they come to the hands of the executor or administrator; so that the inventory figures at best represent only approximately the gross available assets in many instances, and must be supplemented by the administration accounts.¹

§ 328. Exempt articles belonging to widow and children, though not deemed assets, should be included and stated in the inventory without being appraised. N. Y. Stat. cited Redfield's Surr. Pract. 211. And in New York the appraisers appear to have powers as to setting apart for the widow, which in some other States call for the intervention rather of the probate court. Redf. Surr. Pract. 211; Sheldon v. Bliss, 8 N. Y. 31. See c. *post* as to rights of widow, etc. A separate and distinct inventory of the property allowed the widow is required in some States, such as Wisconsin. Gary Prob. Pract. § 321.

A debt returned in the inventory without comment will be presumed collected or collectible. Graham v. Davidson, 2 Dev. & B. Eq. 155; Hickman v. Kamp, 3 Bush, 205. *Contra* where returned as desperate. Finch v. Ragland, 2 Dev. Eq. 137.

¹ See Willoughby v. McCluer, 2 Wend. 609; Mass. Gen. Stats. c. 98, § 6. It is fair that the inventory should show or indicate, as to all interest-bearing securities, the rate of interest, name of debtor, date from which unpaid interest has run, etc. See also Weed v. Lermund, 33 Me. 492.

§ 234. **What the Inventory should contain; Subject continued.** — Local statutes prescribe in terms, more or less specific, what shall be included in the inventory. As to general property of the deceased, the rule embraces all that has come to the “possession or knowledge” of the executor or administrator, and to this his oath of verification usually corresponds in tenor. Hence notes or chattels of any kind in the hands of other persons, and belonging of right to the executor or administrator, must be inventoried, as also debts, demands, and claims still uncollected; and if the representative choose to leave such things in a different possession still, by way of offset to the possessor’s own demand upon the estate, he must go through the form of discharging himself on his accounts.¹ It is not competent, as English courts hold, for the court of probate to insist that an inventory shall include personal estate situated in a foreign country, since this is out of its own jurisdiction and cognizance;² and practically, indeed, the means of appraising what is abroad are imperfect. But it is held by various American tribunals, in construction of the local statute, that personal assets belonging to a deceased resident of the State must be included in the inventory of his general executor, even where situated in another State.³ Such requirement does not apply to an ancillary appointee with such strictness, probably, inasmuch as his authority is more strictly local.⁴

Assets of whose existence neither the executor or administrator, nor the appraisers, are at the time aware, cannot of course be inventoried; and no blame is to be imputed to the representative in consequence, if, gaining knowledge thereof afterwards, he charges himself in his accounts with the prop-

¹ See Wms. Exrs. 1679, 980, Perkins’s note; Smith (Mass.) Prob. Pract. 101–103; Gary Prob. Pract. § 318.

² 2 Cas. temp. Lee, 551; Wms. Exrs. 982.

³ Butler’s Inventory, 38 N. Y. 397.

⁴ See *supra*, § 181. It is held in *Sherman v. Page*, 28 N. Y. Supr. 59, that where the testator names an executor to take charge of property within,

and another of property without the State, such an executor is only bound to account for such property as may be within the State in which he is appointed. Muniments of title and securities representing incorporeal rights abroad, and valuable *per se* in enforcing such rights, ought, in general, we presume, to be inventoried, whatever comity might pronounce the *locus* of the debt or right.

erty, and pursues the usual line of duty as to procuring or realizing the same.¹

§ 235. **Assets and Inventory in Special Instances; Co-ownership, etc.** — Should a stranger administer upon the estate of one of several wards owning a common fund, he can and ought to make an actual division of the fund with the guardian of the surviving wards, and file an inventory accordingly. But if the guardian procures his own appointment as administrator on the deceased ward, he cannot by assuming this double character evade the duty of severing the tenancy in common by other methods equally distinctive and unequivocal; and of likewise filing an inventory which may show the separate share belonging to the estate.²

§ 236. **Effect of the Inventory; Power of the Local Probate Court to alter, etc.; Inventory as Evidence.** — In New York the appraisers' estimate of the value of articles is not regarded as the exercise of an absolute discretion on their part, but their opinion is subject to review by the probate court.³ Such, however, is the inconclusiveness of any inventory valuation in probate law that the court of probate is seldom asked to intervene in such a manner, and the extent, moreover, of such a jurisdiction, apart from statute sanction, may be a matter of serious question.⁴ If, however, the personal representative and the appraisers, or the appraisers among themselves,

¹ As to the duty of the representative to inventory property which has been fraudulently transferred by the decedent, *cf.* *Booth v. Patrick*, 8 Conn. 105, with *Minor v. Mead*, 3 Conn. 289; *Bourne v. Stevenson*, 58 Me. 504; *Andrews v. Tucker*, 7 Pick. 250. And see *supra*, § 220. Agreeably to the principle stated in the text, it is perceived that the inventory includes, by express mention or inference, all the assets, all that the representation is bound to realize and procure for administration purposes; and that the claim of a title for those purposes is its basis, not a title already vested in the representative and undisputed. The doubtfulness of the

title is matter for note by the appraisers in setting the valuation.

² *Colvert v. Peebles*, 71 N. C. 274.

³ *Applegate v. Cameron*, 2 Bradf. 119; *Redf. (N. Y.) Surr. Pract.* 212.

⁴ English temporal judges have denied the authority of ecclesiastical courts to entertain objections to an inventory after it has been exhibited. *Hinton v. Parker*, 8 Mod. 168; *Catchside v. Ovington*, 3 Burr, 1922; *Wms. Exrs.* 983. But the highest ecclesiastical court in England has nevertheless entertained objections to inventories, though not permitting witnesses to falsify it. 2 Add. 331; *Wms. Exrs.* 985.

differ as to what should in fact be included in the inventory, or if otherwise, there is such variance that the inventory cannot be returned to court in due form as exhibiting their concurrence; or if the appraisers are delinquent; the court, as it seems, may properly make orders appropriate to the exigency, and perhaps a warrant might issue to other appraisers, the previous one being revoked. For, inasmuch as, in American practice at least, the failure of the executor or administrator to return a true and perfect inventory is taken to be a direct breach of his official bond,¹ he ought not to be made answerable for the disagreement, caprice, or carelessness on the part of the appraisers, despite his own protest and without his own fault. Where, moreover, appraisers are specially empowered to set apart property for the widow, it is held that their negligence, fraud, or possible abuse of such authority may be corrected by the probate court or surrogate; and likewise an irregularity, mistake, or improper valuation, though conscientiously made by them.²

A court of probate ought not, it would appear, to reject an inventory or order it modified, because it contains property the title to which is disputed; for to common-law tribunals belongs the adjudication of the title, and the probate court cannot conclude the question.³ But, granting that an inventory cannot be impeached, this only affects proceedings relating to the inventory itself; and it may be shown on the accounting of the executor or administrator that assets were omitted which were or ought to have been accounted for, and that assets yielded, or should have yielded, more than they were appraised at; so, *vice versa*, on the accounting, the inventory may be shown to have included what should have been omitted or to have rated specified things for more than they could fairly bring.⁴

¹ Bourne v. Stevenson, 58 Me. 499. An inventory not certified by the executor or administrator is not as to him an inventory, and is not ground sufficient for charging him. Parks v. Rucker, 5 Leigh, 149. But see Carrol v. Connet, 2 J. J. Marsh. 195. An administrator may show that he certified

to the inventory under an error of fact. Martin v. Boler, 13 La. Ann. 369.

² Applegate v. Cameron, 2 Bradf. 119.

³ Gold's Appeal, Kirby (Conn.) 100.

⁴ See c. *post* as to accounts; Montgomery v. Dunning, 2 Bradf. Surr. 220.

An inventory duly returned to the probate court or registry, is, according to modern authorities, *prima facie* proof of the amount of property (personal, or personal and real, as the case may be) belonging to the estate within the State or country where jurisdiction was taken;¹ and also of its worth by items at the time of appraisal. But being only *prima facie* evidence, the executor or administrator is simply chargeable so as to have the *onus* of disproving its correctness;² and in a controversy between himself and the appraisers, he may show that the valuation is too high or too low;³ nor, certainly, are subsequent changes of value, or subsequent additions to the assets, or gains or losses in realizing the assets, to be disregarded, whatever the inventory itself may have shown.⁴ In short, the inventory, while *prima facie* evidence of the value of the property, as well as of the property itself, which came to the executor or administrator, — rendering him *prima facie* liable accordingly, — is not conclusive either for or against the executor or administrator or his sureties, but is open to denial or explanation.⁵ As a matter of judgment record, an appraisement confirmed by the court is conclusive only of the subject to which it relates.⁶

§ 237. **Advantages of returning an Inventory.** — The inventory is of advantage, both to the executor or administrator himself, and to creditors, legatees, heirs, and other persons interested in the estate. It is the basis upon which the

¹ Wms. Exrs. 1966; Giles v. Dyson, 1 Stark. N. P. 32; Reed v. Gilbert, 32 Me. 519; Morrill v. Foster, 33 N. H. 379.

² Ib.; Hoover v. Miller, 6 Jones L. 79; Cameron v. Cameron, 15 Wis. 1.

³ Ames v. Downing, 1 Bradf. 321. See Loeven's Estate, Myrick Prob. (Cal.) 203.

⁴ Willoughby v. McCluer, 2 Wend. 608; Mass. Gen. Stats. c. 98, § 7. The failure to inventory certain property is not conclusive against those interested in the estate. Walker v. Walker, 25

Ga. 76; McWillie v. Van Vacter, 35 Miss. 428. Nor does it estop the representative from recovering it. Conover v. Conover, 1 N. J. Eq. 403.

Concerning the effect of an inventory, as an admission of assets, the English courts have distinguished between the inventory exhibited before probate (as required by some county ecclesiastical tribunals) and the inventory proper. See Wms. Exrs. 1968; Stearn v. Mills, 4 B. & Ad. 657.

⁵ Nabb v. Nixon, 7 Nev. 163.

⁶ Seller's Estate, 82 Penn. St. 153.

representative makes his accounts; it shows the amount for which he is chargeable, and limits presumptively his responsibility, except for increments, income, and such assets not therein appraised, through ignorance, inadvertence, or other cause, as may come afterwards to his hands. On the other hand, the heirs and other parties interested have, in the recorded inventory, the best evidence possible under the circumstances of the assets, their condition and value, as they came to the representative's possession and knowledge at the outset of his administration, and supplies them with essential evidence, in case it becomes necessary to institute proceedings against him or oppose the allowance of his accounts, because of negligence or misconduct while invested with his responsible office.¹

¹ Smith Prob. Praet. 101, 102.

PART IV.

GENERAL POWERS, DUTIES, AND LIABILITIES OF EXECUTORS AND ADMINISTRATORS AS TO PERSONAL ASSETS.

CHAPTER I.

REPRESENTATIVE'S TITLE AND AUTHORITY IN GENERAL.

§ 238. **Title to Personal Property devolves upon Representative by Relation from Decedent's Death.** — We have observed that in modern practice, acts performed before qualification in good faith, and for the benefit of the estate, are generally cured by qualification, whether the representative be executor or administrator; and that his authority once fully conferred by the probate court, the representative's title relates back substantially to the date of the decedent's death.¹ We have observed, also, that as to property left by the decedent, the general rule is that title to personal property devolves thus immediately upon the executor or administrator, while title to the real property does not; and that property of the one kind constitutes at common law assets in the representative's hands, while property of the other kind does not, except under peculiar circumstances, or when there is a deficiency of personal assets.² These statements cover nearly the whole ground of the representative's title; but to better elucidate those fundamental doctrines, let us explore the subject further in the course of the present chapter.

§ 239. **The Representative's Title and Authority during the Administration excludes that of all Others in Interest.** — The title of the executor or administrator, as representative, extends

¹ *Supra*, §§ 194, 195.

² *Supra*, § 198.

so completely to all personal property left by the decedent as to exclude creditors, legatees, and all others interested in the estate. They cannot follow such property specifically into the hands of others, much less dispose of it; but the executor or administrator is the only true representative thereof that the law will regard.¹ The legal and equitable title to all the personal property of the deceased, including *choses in action* and incorporeal rights, vests in fact in the executor or administrator, as against all others, during the suitable period for administration, and he holds this property as a trustee and proper representative of all parties interested therein.²

This paramount title of the personal representative is recognized in various instances. A lien cannot attach on the goods of a principal before he parts with their possession; and, accordingly, if a principal die in possession of the goods, and they come afterward to the possession of his administrator, the title is changed, and a factor, who may receive them from the administrator, cannot be permitted to hold them for advances made to the deceased in his lifetime, without the administrator's assent.³ And so completely does title to the personal assets vest in the representative, that they are not subject to seizure and sale under an execution issued on a judgment rendered against the decedent after his death.⁴ The representative's claim is of course inferior to that of heirs, distributees, or residuary legatees, so long as the estate remains unsettled.⁵

§ 240. **Executor or Administrator has a right to dispose of Personal Assets.**—It follows that the executor or administrator, and he alone, has an absolute dominion and power of dis-

¹ Wms. Exrs. 932; Haynes v. Forshaw, 11 Hare, 93; Nugent v. Gifford, 1 Atk. 463; Beattie v. Abercrombie, 18 Ala. 9; Goodwin v. Jones, 3 Mass. 514.

² Beecher v. Buckingham, 18 Conn. 110; Neale v. Hagthorp, 3 Bland (Md.) 551; Alston v. Cohen, 1 Woods, 487. To this rule statute exceptions are found in some parts of the United States. Thus, under the California system (as in Texas), real and personal

estate follows one rule: it vests in the heir subject to the representative's lien, derived from the deceased, for the payment of debts, etc., and to his right of present possession. Beckett v. Selover, 7 Cal. 215.

³ Swilley v. Lyon, 18 Ala. 552.

⁴ Snodgrass v. Cabiness, 15 Ala. 160.

⁵ Bearzo v. Montgomery, 46 Ind. 544; Alston v. Cohen, 1 Woods, 487.

possession, in law and equity, over the goods, chattels, rights, and effects of the deceased; he can dispose of them at pleasure, being, however, responsible for the faithful execution of his trust; and others in interest cannot follow such property into the hands of the alienee.¹ Only a statute, or the will of the testator, can restrain the power of a personal representative to thus alienate the personal property of his deceased.

§ 241. **The same Subject; Executors and Administrators distinguished in this Respect.** — But here we must distinguish between executors and administrators. An administrator's office is conferred by the court appointment, and his authority is derived from statute and the general probate law, not from any confidence reposed in him by the deceased; his powers and duties consequently are commensurate with others of his class, and are defined by general rules.² But it is quite different with the executor; for his authority, being conferred by a will duly admitted to probate, is subject in a great measure to the powers and restrictions which the testator may therein have prescribed. The will of the testator making special appropriations of the several parts of his property, is a law to his executors from which they ought not to swerve, unless authorized by some proper tribunal,³ and save in accordance with the fundamental maxim, that the necessity of settling lawful debts and charges against one's estate must override all testamentary dispositions. And where trusts are raised by the will, but no trustee is appointed by the testator, the law makes the executor, or any one who may be legally

¹ Beecher v. Buckingham, 18 Conn. 110; Neale v. Hagthorp, 3 Bland (Md.) 551; Lappin v. Mumford, 14 Kan. 9. See *post* more fully as to sales, pledges, etc., of personal property by the representative.

² An administrator in most parts of the United States has all the power over the personal property of the deceased which are possessed by an administrator at common law; and he must administer all the goods, chattels, rights, and credits which are within the

State; the local statute tends to enlarge rather than restrain this authority. See Goodwin v. Jones, 3 Mass. 514.

In Louisiana the law is of civil origin and peculiar; it appears that the functions of an executor cease at the end of a year, while those of an administrator continue until the administration is finished. Ferguson v. Glaze, 12 La. Ann. 667.

³ Voorhees v. Stoothoff, 11 N. J. L. 145; Stallworth v. Stallworth, 5 Ala. 144; Wood v. Nelson, 9 B. Mon. 600.

intrusted with the execution of the will, virtually the trustee in many senses, and he may consequently retain funds in his hands for the purposes of such trust, until the probate court expressly appoints a trustee.¹

§ 242. **But Title, etc., of Executor or Administrator is by way of Trust.**—The title of the representative, however, is not absolute, but exists only for special purposes connected with the settlement of the estate. Thus the title of an administrator vests by way of trust in order to enable him to administer the property according to law, by paying the debts of the deceased, and the funeral and other necessary charges, and making distribution on final settlement.² An executor, again, has the property only under a trust to apply it for payment of the testator's debts, and such other purposes as one ought to fulfil in pursuance of his office under the will.³ Nor can a trust term devised to executors continue so as to retain the legal estate in them a moment longer than is necessary to enable them to perform the objects of the trust.⁴ As with his title, so in its ultimate consequences with his power of disposition, one deals with the property in the interests of the estate he represents. His cardinal duty is to settle the estate according to law, or the last will of the deceased, as the case may be, with due diligence, fidelity, and a reasonable discretion.⁵ In fact, the interest which an executor or administrator has in the property of the deceased is very different from the interest one has in his own property; for, as the old writers state the point, an executor or administrator has his estate as such in *auter droit* merely, viz., as the minister or dispenser of the goods of the dead.⁶

¹ *Saunderson v. Stearns*, 6 Mass. 37; *Dorr v. Wainwright*, 13 Pick. 328; *Groton v. Ruggles*, 17 Me. 137.

² *Hall v. Hall*, 27 Miss. 458; *Lewis v. Lyons*, 13 Ill. 117.

³ See *Ashurst, J.*, in 4 T. R. 645.

⁴ *Smith v. Dunwoody*, 19 Ga. 238.

⁵ The precise legal standard of responsibility is considered in c. *post*.

⁶ 9 Co. 88 b; 2 Inst. 236; Wms.

Exrs. 636. The usual consequences as to property held in *auter droit* attach; thus, at common law, the goods of the deceased were not forfeited by attainder of the executor or administrator, nor applicable to debts which the representative owed to the crown. 1 Hale, P. C. 251; Wentw. Off. Ex. 194, 14th ed.; Wms. Exrs. 636.

§ 243. **Identity of Assets should be preserved apart from the Representative's Private Funds, so as to preserve the Title Intact.** — So long as the property of the estate is kept distinguishable specifically from the mass of his own, the executor or administrator will not by his bankruptcy or insolvency pass the title to his assignees ;¹ nor does bankruptcy of itself affect his representative character, though it might perhaps afford good ground for seeking his removal from the trust.² Nor can goods and chattels which may be identified as belonging to the decedent's estate be taken in execution for the debt of the executor or administrator.³ Nor upon the death of the personal representative will such property held in another's right devolve in title upon his own representative, or pass under the provisions of his will.⁴

So, if an executor or administrator make transfer of all his goods, or release all his demands and rights of action, the presumed intention, and consequently the effect, is that the transfer or release shall not operate upon goods, demands, or rights of action which he has in his fiduciary capacity.⁵ Marriage, too, even under the old law of coverture, did not vest in the husband a title to goods and chattels which belonged to his wife in *auter droit*.⁶

But if the representative mingle the goods, rights, and effects of the intestate with his own, in such a manner that they cannot be distinguished, the effect must necessarily be to subject the whole to a devolution of title in favor of his assignee in bankruptcy, executive creditor, or personal representative, as the case may be. There is quite commonly a partial mingling of the trust funds with one's own ; as in case of the loose cash, specie, or bank bills found about a decedent, which a representative will for convenience mix

¹ Wms. Exrs. 637, 638; 11 Mod. 138; *Farr v. Newman*, 4 T. R. 648.

² Wms. Exrs. 638; removal, *supra*. Where a lease is made with proviso for forfeiture and re-entry if the lessee "or his executors, administrators, or assigns" shall become bankrupt, the bankruptcy of the executor or adminis-

trator will operate accordingly. *Doe v. David*, 1 Cr. M. & R. 405.

³ *Farr v. Newman*, 4 T. R. 621; Wms. Exrs. 640.

⁴ Wms. Exrs. 639, 644; 2 Plowd. 525.

⁵ 1 Show. 153; 2 Ld. Raym. 1307.

⁶ Co. Lit. 351 a; Schoul. Dom. Rel. § 86.

with his own money.¹ In the course of administration, the executor or administrator almost necessarily pays out sums for expenses, taking property of the estate by way of recompense, and by contract incidentally causing a transfer of title to himself. And it is a well-established rule that if the representative pays out of his own moneys debts to the value of the personal assets in hand, he may apply the assets to his own use towards satisfaction of his moneys so expended; and by such election the assets become absolutely his own property.² Where trust and individual funds are mingled, the estate becomes a creditor with other creditors for its just balance; though to place the estate in this precarious attitude is a breach of official duty.³

§ 244. **No Title is taken by Representative, to Property held by Decedent in Another's Right.** — The personal representative takes no available title to personal chattels of which the deceased held possession in another's right, and kept so that their identity may be traced. Thus, the bare fact that one died in possession of property, as administrator on another's estate, will not, it is held, enable his personal representative to maintain trover, even against a mere wrongdoer; for it will be a good defence, that the right to the goods in question has devolved upon the administrator *de bonis non* of the original intestate owner.⁴ So, too, a third person coming into possession of a thing bailed among the dead man's effects, cannot, though he be a coroner, resist the bailor's demand by setting up the title of the deceased bailee's personal representatives.⁵ Nothing but the bailee's possible lien for reimbursement, or *jus tertii* can obstruct the recovery of the property in such cases.⁶

If, therefore, the representative takes possession of personal property which was in possession of his decedent at the time of his decease, but to which another has title, his exercise of dominion is at his own peril; and if he sells the property

¹ See Went. Off. Ex. c. 7, p. 196, 14th ed.; Wms. Exrs. 646.

² Livingston v. Newkirk, 3 John. Ch. 312, 318, *per* Chancellor Kent.

³ See c. *post* as to management, etc.

⁴ Elliott v. Kemp, 7 M. & W. 306.

⁵ Smiley v. Allen, 13 Allen, 365.

⁶ Schoul. Bailm. 71.

as his decedent's, he is individually liable in trover to the true owner for its value.¹ But the mere possession of property by a decedent at the time of his death gives to his legal representative the right to its possession, as against third parties, and he may bring trover accordingly.²

§ 245. **Representative does not succeed to Decedent's Trusts, but should close the Accounts.**—Nor, again, does the representative succeed, by virtue of his office, to any trust exercised by the decedent during his life; but his duty is to render a final account closing up the trust, as respects the deceased, to see that the estate of the deceased is properly reimbursed for all charges and expenditures properly incurred, and relieved of all further responsibility. Should there remain any surplus or further duties to be discharged under the trust, he should transfer the fund to the proper successor in the trust, and leave him to perform all further functions relative thereto.³ Hence, the administrator of an assignee in trust for creditors is not bound in continuance of the trust to superintend the trust property, nor is it strictly proper for him to do so.⁴

§ 246. **How one ceases to hold Assets as Representative, so as to hold in his Individual Character; Election, etc.**—The doctrine of merger sometimes operates in the case of an executor or administrator who, ceasing to hold in that character, becomes holder of assets in his own right.⁵ But the possession of the property of a deceased person, as executor or administrator merely, cannot invest the possession with rights independent of and disconnected with the trust estate.⁶ But to determine, in general, when one ceases to hold property belonging to the estate, as a fiduciary, and holds it in his individual or other inconsistent character, all the circumstances of the case must be regarded.⁷

¹ Yeldell v. Shinholster, 15 Ga. 189;
Newsum v. Newsum, 1 Leigh, 86.

² Cullen v. O'Hara, 4 Mich. 132.

³ See Little v. Walton, 23 Penn. St. 164.

⁴ Bowman v. Raineteaux, 1 Hoffm. 150.

⁵ Wms. Exrs. 641-643; Prest. Conv. 310, 311.

⁶ Gamble v. Gamble, 11 Ala. 966, 975; Weeks v. Gibbs, 9 Mass. 76.

⁷ Wms. Exrs. 643.

Election, as to his character or its change, by the person who has different characters to sustain, becomes an essential fact in any such connection. One who is administrator of two estates, may elect, it is held, to which of the two certain property belongs; but the act manifesting such election on his part must be definite, clear, and certain, to estop him afterwards from asserting title.¹

§ 247. **Devolution of Title where the Personal Representative is also Guardian of Decedent's Children or Trustee under the Will** — To proceed with this line of inquiry. Administrators are not guardians of the decedent's minor children, and cannot incur a fiduciary liability on such children's account;² and the same holds true of executors, save so far as the testator's will may have invested them with the practical functions of a testamentary guardian; for guardianship is a separate trust and should not be blended with that of administration.³ Nor is it within the line of the ordinary duty and authority of an executor or administrator to control property which is exempted from administration for the special benefit of widow and children, or to apply ordinary assets in his hands for maintenance and education.⁴

Thus, the same person may be constituted executor under the parent's will, or administrator, and also guardian of the minor children; hence the question, whether he holds a fund in one or the other capacity.⁵ The presumption arises, where personal estate of the decedent is to be transferred by way of legacy or distribution in favor of such minor children, that one is executor or administrator; for to perform the functions of administration is first in order, and some distinct act of transfer is preliminary to fixing the liability of guardian.

¹ *McClane v. Spence*, 11 Ala. 172; 6 Ala. 894.

² *Meniffee v. Ball*, 7 Ark. 520; *Stallsworth v. Stallsworth*, 5 Ala. 144.

³ Schoul. Dom. Rel. § 324.

⁴ *Wright v. Wright*, 64 Ala. 88; *Davis v. Davis*, 63 Ala. 293. Nor can the executor or administrator be sued as such for maintenance of the minor chil-

dren of the deceased. *Kent v. Stiles*, 2 N. J. L. 368. And as to the widow's necessities, see *Sieckman v. Allen*, 3 E. D. Smith (N. Y.) 561. See *c. post* as to allowances to widow, children, etc.

⁵ Schoul. Dom. Rel. § 324; *Wren v. Gayden*, 1 How. (Miss.) 365; *Johnson v. Fuquay*, 1 Dana, 514.

Passing the final accounts of administration, properly, this transfer of responsibility becomes manifest enough;¹ but where accounts are not rendered by the fiduciary, circumstances, and often slight ones, after a long lapse of time, may conclude the question. And the better opinion appears to be that where a sole representative is at the same time guardian, the law will adjudge his ward's proportion of the estate to be in his hands as guardian after the full expiration of time fixed for the settlement of the estate.² On legal principle, one ought not to be sued both as executor or administrator and as guardian, nor should both sets of sureties be held responsible for the fund; but in doubtful cases of this kind, where the principal's delinquency has occasioned the doubt, the modern inclination is to let the ward sue both sets of sureties, leaving them to adjust their equities among themselves.³

Similar considerations apply to the case of an executor who has likewise been constituted trustee under the will; though here, perhaps, the regular qualification and procurement of letters which fixes the character of the later fiduciary is more likely to be postponed to the final accounting and settlement of the estate than in the case of a guardianship. One should not be made liable as trustee for funds which came to his hands as executor; but after the lapse of a considerable period the presumption may fairly be that the estate has been fully administered by the executor, and accordingly that the funds are held by him in the new character of trustee.⁴

§ 248. Devolution of Title where Representative is also a Legatee or Distributee.—An executor who is also a legatee

¹ Schoul. Dom. Rel. § 324; *Alston v. 623*; *Weaver v. Thornton*, 63 Ga. 655; *Munford*, 1 Brock, 266; *Burton v. Tun-* *Carrol v. Bosley*, 6 Yerg. 220. But the
nell, 4 Harring. 424; *Stillman v. Young*, rule may be otherwise with co-executors
16 Ill. 318; *Scott's Case*, 36 Vt. 297. or co-administrators. *Watkins v. State*,
But see *Conkey v. Dickinson*, 13 Met. 51. 4 Gill & J. 220; *Coleman v. Smith*, 14

² *Watkins v. State*, 4 Gill & J. 220; *S. C. 511.* And see Schoul. Dom. Rel. § 324.
Karr v. Karr, 6 Dana, 3; *Crosby v.*

Crosby, 1 S. C. N. s. 337; *Wilson v.* ³ *Harris v. Harrison*, 78 N. C. 202;
Wilson, 17 Ohio St. 150; *Townsend v.* *Perry v. Carmichael*, 95 Ill. 519.

Tallant, 33 Cal. 45; *Wood, Re*, 71 Mo. ⁴ *Jennings v. Davis*, 5 Dana, 127.

may, by assenting to his own legacy, vest the bequest personally in himself; and so may an administrator who is also a distributee appropriate his own share by acts and conduct manifesting such assent. The acquisition of an individual title to particular assets, in pursuance of such an intention, may be evinced by writings, duly executed with the other legatees or distributees; though such formality is not necessary, if the actual appropriation be otherwise manifested by the circumstances.¹

§ 249. Devolution of Title where Executor is also Residuary Devisee and Legatee. — An executor who is residuary devisee and legatee, and gives bond for the payment of debts and legacies, becomes absolute owner of the real and personal estate, subject to that fiduciary obligation, and may sell or otherwise dispose of it so as to give a corresponding title.²

§ 250. Executor should administer Estate undisposed of under the Will where there is a Partial Intestacy. — It is the right and duty of the executor to administer upon estate undevised or undisposed of under the will, where there is a partial intestacy, as well as to execute the will itself; and this he may do *ex officio* without procuring letters of administration for that purpose,³ being in such a sense considered trustee for the next of kin.

§ 251. Right and Duty of discharging Contract Liabilities, etc., of Deceased. — To the personal representative belongs the control of the legal assets; also the right, together with the duty, of collecting all claims and discharging all liabilities of the decedent. As a general rule, the personal representative may, in his discretion, perform or rescind or modify with

¹ Elliott v. Kemp, 7 M. & W. 313; legacies, *post*; Wms. Exrs. 649.

² Clarke v. Tufts, 5 Pick. 337.

³ Hays v. Jackson, 6 Mass. 149; Wilson v. Wilson, 3 Binn. 557; Landers v. Stone, 45 Ind. 404; Parris v. Cobb, 5 Rich. Eq. 450; Venable v. Mitchell, 29 Ga. 566; Dean v. Biggers, 27 Ga. 73.

Whether this rule applies to an administrator with the will annexed, see c. *post*. The local statute is sometimes explicit as to the rule stated in the text. Venable v. Mitchell, *supra*.

See as to the effect of appointing an administrator in such cases. Patton's Appeal, 31 Penn. St. 465.

the consent of the other party any contract made personally by the deceased; this, however, conformably to the law of contracts, and for the reasonable interest of the estate.¹ He may, as the law at the present day stands, compromise a lawsuit, buy the peace of the estate he represents, and extinguish doubtful claims against it, provided he act discreetly and in good faith.² For the representative takes the place of the decedent as to all contracts on which the latter was bound at his death, and is expected to discharge them in the manner provided by law, or according to the means in his hands for properly liquidating all of the decedent's obligations.³ And yet the executor or administrator has no inherent power to bind the estate or those interested in it, by special agreements, with a creditor, to keep open indefinitely the adjustment of his demand;⁴ nor to impose onerous charges upon the estate;⁵ nor to make a specific transfer of assets at discretion, so as to create an unlawful preference among creditors,⁶ or defraud others interested in the estate of their just rights.⁷ He must appropriate the assets honestly and discreetly to the purposes and in the manner prescribed by law for the administration, settlement, and distribution of estates of the dead.

§ 252. **Avoidance, etc., of Contracts by the Deceased Illegally made, etc.** — The representative may avoid or dispute a contract, made by his testate or intestate, as having been illegal, corrupt, and contrary to good morals or public policy, or as entered into when the decedent was of unsound mind.⁸ In general he may set up such pleas in defence as were open to his decedent; and out of regard to the interests he represents, he may even take advantages and set up defences

¹ Gray *v.* Hawkins, 8 Ohio St. 449; Dougherty *v.* Stephenson, 20 Penn. St. 210; Laughlin *v.* Lorenz, 48 Penn. St. 275; Davis *v.* Lane, 11 N. H. 512.

² Meeker *v.* Vanderveer, 15 N. J. L. 392, *per* Hornblower, C. J.

³ Woods *v.* Ridley, 27 Miss. 119.

⁴ Collamore *v.* Wilder, 19 Kan. 16.

⁵ Gayle, Succession of, 27 La. Ann. 547.

⁶ Gouldsmith *v.* Coleman, 57 Ga. 425.

⁷ Brown *v.* Evans, 15 Kan. 88.

⁸ Eubanks *v.* Dobbs, 4 Ark. 173; Sanford, J., in Ross *v.* Harden, 44 N. Y. Super. 26.

from which the decedent by his own acts might have been precluded.¹

§ 253. **Contracts Personal to the Deceased, etc., distinguished from those requiring Performance after his Death.**— There may be contracts of the deceased which are designed to extend beyond his lifetime, and whose breach of fulfilment will involve the estate in damages; contracts, too, whose effect is to incumber lands devised or the residuary fund.² All contracts of the decedent, however, are to be construed with reference to their subject-matter; and hence, a contract to perform certain duties growing out of an existing personal relation, or requiring the exercise of a personal skill and taste, ceases to be binding when death terminates that relation, and the representative cannot be compelled to continue the performance.³

Subject to the exceptions just noticed, the death of one of two contracting parties does not necessarily terminate the contract, and his estate may be held liable in damages for any breach committed after as well as before his death.⁴ And if a contract with a deceased party is of an executory nature, and his personal representative can fairly and sufficiently execute all that the deceased could have done, he may do so, and enforce the contract.⁵ How all this shall be done becomes a matter for the exercise of fidelity and due business discretion on the representative's part, aided, if need be, by the advice or authority of the court or of those interested in the estate and its surplus. Thus the executor or adminis-

¹ See § 220 as to recovering property fraudulently transferred by the decedent. An oral contract made with the decedent to hold the custody of certain assets after his death, subject to some contingency, such as the arrival of A. from abroad, cannot, it would appear, be set up to the detriment of an executor's or administrator's right to demand possession upon his qualification. *Ross v. Harden*, 44 N. Y. Super. 26.

² See *Pringle v. McPherson*, 2 Desau. 524.

³ *Bland v. Umstead*, 23 Penn. St. 316; 1 Par. Contr. 6th ed. 131; *Siboni v. Kirkman*, 1 M. & W. 418; *Wms. Exrs.* 1725; *Smith v. Wilmington Coal Co.* 83 Ill. 498; *McGill v. McGill*, 2 Met. (Ky.) 258. And see c. 5, *post*, as to the responsibility of an executor or administrator.

⁴ *Smith v. Wilmington Coal Co.*, 83 Ill. 498. See 40 Mich. 226.

⁵ *Ib.*; c. 5, *post*.

trator of a manufacturer or artisan may well have materials worked up into goods fit for merchandise. The representative of a mechanic may finish up the jobs on which he was engaged; all this, supposing that what was left by the deceased may properly be finished by others, and at a reasonable hope of profit to the estate, which might otherwise be liable in damages as for breach of contract.¹

§ 254. **Personal Liability of the Representative upon the Decedent's Debts or Contracts.** — At common law, if an executor or administrator undertakes to perform the contract of the decedent, it is upon his own personal responsibility, so that if losses are sustained he must bear them, while if profits are realized they become assets in his hands for the benefit of the estate.² Equity and modern probate courts regard the question of honesty and due discretion on his part in passing upon the representative's accounts afterwards. But this is only so far as relates to charging him with reference to the assets in his hands; and his personal liability may transcend the limit of the means at his command where he contracts without a careful reservation in that respect. For, though a bare promise by the executor or administrator binds only the assets, the true doctrine is that he may make himself personally liable by his written promise, founded upon a sufficient consideration.³

§ 255. **The same Subject; how such Liability is incurred; Statute of Frauds; Sufficient Consideration, etc.** — Let us dwell briefly upon this point of a written contract by the representative founded in sufficient consideration. In both England and the United States the executor's or administrator's promise to pay a debt or to answer for damages of his decedent will not, it is held, render him personally liable unless there was a sufficient consideration to support the promise;

¹ *Marshall v. Broadhurst*, 1 Cr. & Ill. 498; *Mowry v. Adams*, 14 Mass. Jerv. 405; *Garrett v. Noble*, 6 Sim. 504; 327.
Wms. Exrs. 1794.

² Wms. Exrs. 1776, and Perkins's note; *Davis v. French*, 20 Me. 21; *Ellis v. Merriman*, 5 B. Mon. 296.

³ *Smith v. Wilmington Coal Co.*, 83

for a bare promise charges him, not out of his own estate, but only in a representative capacity and to the extent of the assets in his hands, just as though he had made no promise.¹ A bare promise, there being no assets at all, is, therefore, *nudum pactum*; and so is any promise made, by one having no actual or potential representative character, to pay a dead person's debts.² Under the Statute of Frauds, such collateral promises to bind one individually should be made in writing;³ and, moreover, on general principle, there should either be a seal to import a consideration or else an actual good consideration for the promise. A verbal promise, therefore, of the representative to pay his decedent's debt may be void as without consideration or void under the Statute of Frauds as not reduced to writing.⁴

Apart from any statute requirement that the consideration itself, as well as the rest of the agreement, should be expressed in writing (a point concerning which English and American authorities do not quite harmonize), a sufficient consideration for such promise arises where the creditor forbears to sue the executor or administrator; and forbearance to sue is in various instances held to be a good consideration,

¹ Wms. Exrs. 1776; *Reech v. Kennegal*, 1 Ves. Sen. 126; *Nelson v. Serle*, 4 M. & W. 795. But see *Ridout v. Bristow*, 1 Cr. & J. as to the promise by a widow. Also *Templeton v. Bascom*, 33 Vt. 132, as to the promise by sole distributee.

² *Tomlinson v. Gill*, Ambl. 330.

³ 29 Car. II. c. 3, whose provisions are enacted in all or most American States, declares that no action shall be brought to charge any executor or administrator upon any special promise to answer damages out of his own estate, or to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, etc., unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some

other person thereunto by him lawfully authorized. The word "agreement" here used has in England been held to mean that the consideration of the promise as well as the promise shall be expressed in writing, or readily gathered from it. Wms. Exrs. 1784; *Wain v. Warlters*, 5 East, 10. But while in some of the American cases the English rule of construction is applied to corresponding local enactments, others construe the language differently, and the modern tendency appears to be against requiring the consideration as well as the promise to be so plainly expressed. Wms. Exrs. 1784, note by Perkins; 1 Chitty Contr. 11th Am. ed. 92.

⁴ *Sidle v. Anderson*, 45 Penn. St. 464; Wms. Exrs. 1776; *Walker v. Patterson*, 36 Me. 273; *Winthrop v. Jarvis*, 8 La. Ann. 434; *Hester v. Wesson*, 6 Ala. 415.

and not within the statute, even though there were no assets at the time of the promise.¹ So, too, having assets is a good consideration, according to various modern authorities, for the executor's or administrator's promise to pay a debt or claim which the decedent owed; this being, perhaps, a sort of equitable enlargement of the old rule on this subject out of regard to the superior knowledge which every representative should possess as to the means at his disposal for paying demands upon the estate; so that, having assets and promising, the representative becomes personally bound.²

§ 256. **The Representative's own Creation of a Debt binds Himself and not the Estate.**—And here we should observe that an executor or administrator has no power in such capacity to create a debt against the deceased. He may clearly have intended to so; but the effect of such an engagement is, instead, to bind himself individually on the assumed faith that the assets he controls will, subject to the rules of administration which he is bound to observe, furnish ample indemnity to himself for incurring the risk. Ordinarily, debts contracted by the personal representative are obligatory only as personal obligations, and cannot, primarily, bind the estate committed to him or charge specifically the *corpus* of the assets; these assets being primarily bound rather for the debts which the deceased himself contracted during his lifetime.³ The executor or administrator may contract, doubtless, on principle, for all necessary matters relating to the estate which he represents; but the immediate and practical result is that, a sufficiency of assets being presumed as an element in the undertaking, he contracts as

¹ 1 Roll. Abr. 15, 24; Wms. Exrs. 1778-1781; Hawes v. Smith, 2 Lev. 122; Bradley v. Heath, 3 Sim. 543; Mosely v. Taylor, 4 Dana, 542. And see Templeton v. Bascom, 33 Vt. 132. But where there could plainly be no suit brought, so that the forbearance was needless, *semble* the representative's personal promise fails of such consideration. McElwee v. Story, 1 Rich. 9.

² Wms. Exrs. 1783; Cowp. 284, 289; Reech v. Kennegal, 1 Ves. Sen. 126; Sleighter v. Harrington, 2 Murph. 332; Thompson v. Maugh, 3 Iowa, 342.

³ Ferry v. Laible, 27 N. J. Eq. 146; Clopton v. Gholson, 53 Miss. 466; McFarlin v. Stinson, 56 Ga. 396; Taylor v. Mygatt, 26 Conn. 184; Austin v. Munro, 47 N. Y. 360.

upon his personal responsibility to keep good that sufficiency. And, notwithstanding the intent is to benefit the estate, every contract made upon a new and independent consideration, moving between the promisee and personal representative, is the personal contract of the latter, binding himself and not the estate represented.¹

Indeed, the rule is that executors and administrators cannot, by virtue of their general powers as such, make any contract which at law will bind the estate and authorize a judgment *de bonis decedentis*. But on contracts made by them for necessary matters relating to the estate, they are personally liable, and must see to it that they are reimbursed out of the assets.² The addition of the word "executor" or "administrator" in such a contract is insufficient to relieve the representative of this personal liability;³ for if it be understood that the other party must rely upon the assets and not the representative, and must take the risk of their adequacy upon himself, the mutual expression should be clearly to that effect; and even thus, no lien would arise on the creditor's behalf, but the covenant of the executor or administrator, limited to the extent of assets in his hands, would bind him personally to that extent.⁴

¹ This doctrine applies to the debt incurred by the representative in employing counsel to advise and assist him in the discharge of his duty. *Devane v. Royal*, 7 Jones (N. C.) L. 426; *Bowman v. Tallman*, 2 Robert. 385; *McGloin v. Vanderlip*, 27 Tex. 366; *McMahon v. Allen*, 4 E. D. Smith (N. Y.) 519. Or where he purchases goods for the benefit of the estate. *Harding v. Evans*, 3 Port. 221; *Lovell v. Field*, 5 Vt. 218. An executor or administrator has no power to bargain with an attorney to give him a legal interest in the estate as compensation for his services so as thereby to bind the estate. 48 Tex. 491; 57 Cal. 238; *Austin v. Munro*, 47 N. Y. 360. His own allowance from the court, legacy, share, or claim is all that he can thus dispose of under any circumstances. But as to compensation,

etc., allowable out of the estate, see accounting, *post*.

That an executor cannot create a lien on the assets for a debt due during the decedent's lifetime, see *Ford v. Russell*, 1 Freem. Ch. 42; Ga. Dec. Part II. 7; *James's Appeal*, 89 Penn. St. 54.

² *Pinkney v. Singleton*, 2 Hill, 343; *Miller v. Williamson*, 5 Md. 219; *Sims v. Stilwell*, 4 Miss. 176; *Jones v. Jenkins*, 2 McCord, 494; *McEldry v. McKenzie*, 2 Port. 33; *Underwood v. Millegan*, 8 Ark. 254.

³ *Hopkins v. Morgan*, 7 T. B. Mon. 1; *Beaty v. Gingles*, 8 Jones L. 302.

⁴ *Nicholas v. Jones*, 3 A. K. Marsh. 385; *Allen v. Graffins*, 8 Watts, 397. A note made by an administrator, as such, by which he promises to pay, etc., for value received by the intestate and

§ 257. **Lien on the Assets is for Representative rather than for the Person dealing with him; Estate how far Answerable.** — Persons, therefore, who deal with the executor or administrator acting independently in such capacity, can acquire no lien upon or right to proceed immediately against the trust estate in his hands. The executor or administrator himself, like other trustees, appears to have a charge or lien in his favor for proper expenses and charges fairly and reasonably incurred in the prosecution of his trust; but the privilege does not extend to others employed by him or to whom he, as executor or administrator, has incurred an individual liability to pay.¹ This rule, though sometimes working harshly, is founded in sound policy, and better ensures a proper appropriation of the estate which the decedent left behind him. It enables the broad maxim to be applied, that for false and fraudulent representations by the executor or administrator, and upon promises which he had no right to make, the property of the decedent cannot be held liable, and that a creditor's collusion with that object in view cannot be permitted to operate to his own advantage.

But the estate of the deceased ought to be made responsible for promises and engagements made by the representative, which he had the legal right to make, or where in law it was his duty without a promise to do just what he has promised to do.² Whatever the methods for accomplishing this, there are usually found some practical means thus available; as, for instance, in the case of funeral charges, and, in general, as to creditors of the estate so far as the assets, properly administered upon equitable principles, may suffice for their genuine purpose of satisfying all just claims upon the estate. Claims are settled after probate rules established for general convenience, to be noted hereafter;³ and accord-

his heirs, is void for want of consideration. *Ten Eyck v. Vanderpool*, 8 Johns. 120. And see 37 Miss. 526.

¹ *Wms. Exrs.* 1792; *Kirkman v. Boothe*, 11 Beav. 273; *Corner v. Shew*, 3 M. & W. 350; *Fitzhugh v. Fitzhugh*, 11 Gratt. 300; *Montgomery v. Armstrong*, 5 J. J. Marsh. 175; *Steele v.*

Steele, 64 Ala. 438; *Woods v. Ridley*, 27 Miss. 119, 149; *Harrell v. Wither- spoon*, 3 McCord, 486.

² *Brown v. Evans*, 15 Kan. 88.

³ See c. v. *post* as to remedies, and the peculiar rule, e.g., as to funeral expenses.

ing as the contract arose with the deceased or with the representative himself.

§ 258. **The same Subject; Negotiable Notes, etc., running to the Executor or Administrator; Other Instances.**—The foregoing principles apply to negotiable instruments which the representative executes. Thus, the signature "A. B., executor," or "A. B., administrator," to such paper cannot bind the decedent's estate directly, even though specifying that estate by name; but A. B. will be held personally liable.¹ It has been held that an individual liability is not thus incurred unless the representative has assets, or forbearance was the consideration;² and yet, giving one's own obligation expressly payable at a future day should be regarded as an admission, perhaps conclusive, of assets.³ Where a bill is indorsed to certain persons as executors, and they indorse it over, they become personally liable.⁴ As the current of American decisions runs, an executor or administrator, signing or indorsing a note as such, does not escape a personal liability thereon unless he expressly confines his stipulation to payment out of the estate;⁵ nor is parol evidence competent to establish such a reservation, though the note be signed officially.⁶

Within the principles we have discussed, it may be asserted that, while a bond or covenant given by the representative as such, whereby he undertakes to assume whatever may be his decedent's debts, binds him as an "agent," so called, who has no principal,⁷ a bond given by him which is expressed to

¹ Winter v. Hite, 3 Iowa, 142; Yelv. 11; Wms. Exrs. 1780; Christian v. Morris, 50 Ala. 585; East Tenn. Co. v. Gaskell, 2 Lea, 742. And see Sieckman v. Allen, 3 E. D. Smith (N. Y.) 561. This rule applies though the new promissory note be given in renewal of a matured promissory note executed by his decedent. Cornthwaite v. Nat. Bank, 57 Ind. 268.

² Bank of Troy v. Topping, 9 Wend. 273. In s. c., 13 Wend. 557, it is admitted that executing such note is *prima facie* evidence of assets.

³ Thompson v. Maugh, 3 Iowa, 342; Childs v. Monins, 2 Br. & B. 460. The words "value received" might be important in this connection. See 1 Cr. & J. 231. Or promising to pay with interest. 2 Br. & B. 460.

⁴ Buller, J., in King v. Thom, 1 T. R. 489. See Snead v. Coleman, 7 Gratt. 300.

⁵ Studebaker M. Co. v. Montgomery, 74 Mo. 101.

⁶ McGrath v. Barnes, 13 S. C. 328.

⁷ Patterson v. Craig, 57 Tenn. 291.

pay out of the assets the balance due in settlement, will not bind him beyond the assets received.¹ And where he gives his personal notes simply in extension or renewal of those upon which his decedent was originally responsible, the natural import of the transaction is not an extinguishment of the liability of the estate to the creditors' disadvantage; nor certainly so as to deny to the representative himself the means of securing himself from the estate.² Giving his own note or obligation for a debt of the decedent will not in any case exempt the estate from ultimate liability for the debt.³

On the other hand, the recognition by the executor or administrator of a claim against the estate, arising subsequent to the decedent's death and upon his own contract, will give it no additional validity; for it is not the estate that shall answer directly for it to the creditor, but the representative himself.⁴

Supposing some statute of limitations to have debarred the creditor from prosecuting his claim against the estate;⁵ a promise by the representative to pay the claim, if made in writing, whether in the form of a negotiable note officially signed or otherwise, may bind him personally upon the theory of a sufficient consideration founded in the possession of assets.⁶

§ 259. **Iden on the Assets, how far existing for the Representative's own Immunity.**—The individual obligation which the representative necessarily incurs by assuming to fulfil, even in the name of his office, engagements of the decedent, serves as a caution against his assuming too much, or undertaking more on behalf of the estate he represents than the assets at his command fairly warrant. When, however, an executor or administrator pays a debt or discharges a contract which con-

¹ *Allen v. Graffins*, 8 Watts, 397. And see 58 Ind. 58.

² *Peter v. Beverly*, 10 Pet. 532; 1 How. 134.

³ *Douglas v. Fraser*, 2 McCord Ch. 105; *Maraman v. Trunnell*, 3 Met. (Ky.) 146; *Dunne v. Deery*, 40 Iowa, 251.

⁴ *May v. May*, 7 Fla. 207; *Davis v. French*, 20 Me. 21; *Lyon v. Hays*, 30 Ala. 430; *Woods v. Ridley*, 27 Miss. 119, 149.

⁵ On this point, see *post*, c. 5.

⁶ *Oates v. Lilly*, 84 N. C. 643; *McGrath v. Barnes*, 13 S. C. 328. And see *Bacon v. Thorp*, 27 Conn. 251.

stitutes in reality a just charge against the estate of the testator or intestate, out of his private funds, he will be entitled to an allowance for the same in his accounts; and administration under probate and equity direction supplies a sort of lien upon the assets for his reimbursement.¹

This lien upon the assets, however, if such we may term it, does not secure the representative for liabilities or expenses incurred outside the proper scope of his official duty. Thus, if he chooses to warrant title to the purchaser in selling assets, the risk which he assumes thereby is his own.² And the disallowance in his accounts of expenses incurred and losses sustained through culpable negligence or bad faith puts a practical limit to his reimbursement out of the assets.³

§ 260. **This Rule of Lien applied in settling Account of a Representative Deceased, Removed, etc.** — So, too, where an executor or administrator pays debts of the decedent out of his own funds, and dies or is removed before he has received assets sufficient to reimburse him, he or his own representative should be allowed to stand in the place of the creditor whose demand has been extinguished, and to assert the demand against the successor in his late trust.⁴ Circumstances may exist in which it is not wrong in the original representative, although it may not be a positive duty, to make advances for the benefit of the estate which he administers, and where, by his death or removal from office, he may be unexpectedly deprived of the power to reimburse himself. Where advances have been made in good faith, and for the benefit of the estate, they in some form become a charge upon the estate in the hands of his successor in the trust, whose duty it is to pay them as much as if they had occurred in the course of his own administration.⁵ The safer and the usual course,

¹ See *Woods v. Ridley*, 27 Miss. 119, 149.

² See *c. post* as to transfer of assets; *Stoudenmeier v. Williamson*, 29 Ala. 558; *Lockwood v. Gilson*, 12 Ohio St. 526.

³ See *c. post* as to the representative's liabilities; also *post*, Part VII., concerning his accounts.

⁴ *Smith v. Haskins*, 7 J. J. Marsh. 502; *Munroe v. Holmes*, 9 Allen, 244.

⁵ Hoar, J., in *Munroe v. Holmes*, 13

however, is for an executor or administrator to advance nothing and incur no expenditure or charge beyond the value of chattels in hand, or assets as actually realized, thus relying simply upon his lien to reimburse himself, or else his contemporaneous appropriation of chattels instead, by way of election; in which case the final settlement of his accounts involves a mere transfer of the just balance or residue to the successors, and avoids the disadvantage of an active pursuance of remedies against the latter.¹

If at the time of the original executor's or administrator's decease or removal there should remain personal assets in his hands, enough may be retained to satisfy the balance found due on an accounting of his administration. Otherwise, personal assets coming to the hands of the representative *de bonis non* are justly applicable to settling this balance; and, if no personal assets, real estate of the deceased may equitably be reached; the difficulty is only the practical one as to the best mode of thus enforcing the charge against the estate when the first representative's lien is wanting.²

§ 261. **Assets recovered by Representative on his own Contract enures to the Estate.**—Where an executor or administrator recovers in his own name upon a contract made with him personally after the death of the decedent, respecting the estate or for money received by the defendant for the use of the estate after such death, he is answerable in his fiduciary capacity for the amount recovered, as for assets.³

Allen, 109. In *Munroe v. Holmes*, *supra*, it was held that there was no action at common law available against the administrator *de bonis non* on behalf of the original representative, although the amount due had been ascertained on presentation of the latter's accounts. But proceedings in the probate court were allowed under statute provisions relating to a suit on an administrator's bond.

¹ The power of the probate court extends only to the assets of the estate, and the court cannot make an allowance

other than that which is properly chargeable against the estate. *Clement v. Hawkins*, 16 Miss. 339.

² See Hoar, J., in *Munroe v. Holmes*, 13 Allen, 109. And as to appropriating notes which were executed to one in his capacity of executor and administrator, and which remained uncollected and undisposed of during his lifetime, see *Maraman v. Trunnell*, 3 Met. (Ky.) 146.

³ *Mowry v. Adams*, 14 Mass. 327; *Smith v. Wilmington Coal Co.* 83 Ill. 498.

§ 262. **The Estate should not derive Unconscientious Advantage, etc.**— While, as we shall see, a decedent's estate is not to be rendered responsible in damages for torts and frauds committed by the representative, and while, moreover, in a sale of assets the rule is *caveat emptor*, it would appear that an estate ought not to derive any unjust or unconscientious advantage from the representative's misconduct.¹ One should not claim a right in behalf of the estate he represents, founded upon the fraud of the decedent;² nor be heard to assert for his justification that his fraud or his violation of law redounded to the benefit of the estate.³

§ 263. **Whether Admissions by Representatives bind the Estate.**— Executors or administrators by their admissions bind the estate.⁴ But such admissions or declarations by a representative are only competent evidence as to his own acts after he became clothed with the trust, and do not bind the estate in so far as they refer to what the decedent told him during his life.⁵

§ 264. **Representative's Power over Assets whether controlled by Probate or Equity Courts.**— It is held that the executor's or administrator's power of disposing of assets is not controlled or suspended by the mere filing of a bill of equity on the part of the creditor for the administration of the estate; for it is said such power continues until there has been a decree in the suit.⁶ Bills for administration of assets are not common in American practice; but the representative proceeds upon qualification to perform his duties according to the terms expressed in his probate credentials, and subject to the conditions of his probate bond, which serves as security to those interested in the estate, being filed in the probate registry. Creditors who are aggrieved can have

¹ *Able v. Chandler*, 12 Tex. 88; *Cock v. Carson*, 38 Tex. 284.

² *Armstrong v. Stovall*, 26 Miss. 275.

³ *Crump v. Williams*, 56 Ga. 590.

⁴ *Sample v. Liscomb*, 18 Ga. 687.

And they may release witnesses from

liability to the estate. *Neal v. Lamar*, 18 Ga. 746.

⁵ *Godbee v. Sapp*, 53 Ga. 283.

⁶ *Neeves v. Burrage*, 14 Q. B. 504;

Wms. Exrs. 942.

ready recourse to the common-law tribunals ; besides which, various local statutes provide the means of authenticating and filing their claims at the probate office.¹ Where an executor or administrator has taken possession of personal property as part of the estate of his decedent, a probate court has no inherent jurisdiction to compel him to deliver it to the owner thereof, upon a summary application of the owner ;² nor in general can such tribunals interfere with the regular course of justice before the common-law tribunals. Nor will a court of equity interfere usually with an executor or administrator as respects the due administration of assets in his hands, unless there is reason to fear some probable injury to the rights and interests of the complainant.³

But an executor, trustee, or other fiduciary cannot have an authority conferred upon him, not in some measure subject to the control and supervision of the probate and chancery tribunals, as in compelling accounts and passing upon their allowance ; and should a testator have directed otherwise, that direction must be disregarded.⁴ A purely arbitrary discretion, independent of the judicial rules which govern the settlement of estates, is not to be exercised by an executor, nor is the testator presumed to have intended conferring it.⁵

§ 265. *Interpleader, etc., for Instructions, etc., by the Personal Representative.* — Executors and trustees, by bill in the nature of a bill of interpleader, may take the advice of a court of chancery upon questions connected with the discharge of their duties. But the interposition of the court in such case is discretionary, and will not be exercised except in matters of importance involving one's own course of action.⁶ An administrator cannot resort to equity as a

¹ See Part V. *post*, as to the payment, etc., of claims.

² *Marston v. Paulding*, 10 Paige, 40; *Crawford v. Elliott*, 1 Bailey, 206.

³ *Ashburn v. Ashburn*, 16 Ga. 213.

⁴ *Holcombe v. Holcombe*, 11 N. J. Eq. 281. See as to directing for a contest concerning a gift *causa mortis*, *Wadsworth v. Chick*, 55 Tex. 241.

⁵ *Hull v. Hull*, 24 N. Y. 647.

⁶ *Crosby v. Mason*, 32 Conn. 482; *Parker v. Parker*, 119 Mass. 478; *Annin v. Vandoren*, 14 N. J. Eq. 135; *Goodhue v. Clark*, 37 N. H. 525; *Houston v. Howie*, 84 N. C. 349; *Woodruff v. Cook*, 47 Barb. 304; *Shewmake v. Johnson*, 57 Ga. 75. In England the stat. 22 & 23 Vict. § 30, ex-

matter of course, to obtain its aid and instruction in the settlement of his intestate's estate, but only where there are special circumstances involved in such settlement which justify so unusual a proceeding.¹ And, in general, no executor or administrator should ask for instructions upon a point as to which, considering the actual condition of the estate, he is not, and probably never will be, embarrassed in the performance of his duties.²

§ 266. **Representative not a Proper Party to Suits for annulling a Marriage.**—The executor or administrator is not the proper representative of the deceased person to annul his marriage. Statutes which sanction such proceedings leave it rather to children or relatives to take that momentous responsibility.³

§ 267. **Vesting of Possession; Chattels Real, etc., as distinguished from Chattels Personal.**—A distinction is drawn in the books between chattels personal and chattels real, as to the vesting of possession in the representative. The property of personal chattels draws to it the possession, and hence, as to all such property of the deceased, wherever situated, the representative acquires possessory title at once.⁴ But as to chattels real, leases, and other chattel-interests in things immovable, including tenancies at will or from year to year, of these the representative, though potentially owner, is not deemed to be in possession before entry.⁵

pressly confers the right upon executors or administrators to apply by petition to a court of chancery for opinion, advice, and direction respecting the management or administration of the property. Wms. Exrs. 1909.

¹ Pitkin v. Pitkin, 7 Conn. 315; McNeill v. McNeill, 36 Ala. 109; Beers v. Strohecker, 21 Ga. 442. Executors and others should not seek the construction of a will or instructions as to future remote contingencies disconnected with a continuing duty on their part. Minot v. Taylor, 129 Mass. 160; Powell v. Demming, 22 Hun, 235.

² Rexroad v. Wells, 13 W. Va. 812. And see further, Putnam v. Collamore, 109 Mass. 509. There are circumstances of embarrassment under which an administrator *de bonis non* or an administrator with will annexed may properly ask for instructions as to his course. Sellers v. Sellers, 35 Ala. 235.

³ Pengree v. Goodrich, 41 Vt. 47; Schoul. Hus. & Wife, § 13.

⁴ Wentw. Off. Ex. 228, 14th ed.; Wms. Exrs. 635; Doe v. Porter, 3 T. R. 13; Taylor Landl. & Ten. § 434.

⁵ Ib. And see *supra*, § 223.

The reversion of a term, however, which the testator granted for part of the term, is held to be in the executor, immediately upon the death of the testator;¹ and it would seem that the rule of law which makes the title of administrator as to personal chattels relate back to the death of the intestate, so as to enable him to recover for mesne injuries or their conversion, applies likewise to chattels real, only that he must first enter.² This requirement of entry appears to be raised, therefore, for his benefit so as not to force him to assume the liabilities of tenant.

§ 268. **Whether the Representative may act by Attorney.**—In many transactions the legal representative manages the estate with the aid of some attorney of his choice. But the rule is, that one delegated to a trust cannot delegate that trust to another; so that ultimately the official discretion and responsibility become his own.³ A power of disposition given under a will to executors, which is a personal trust, cannot, therefore, as a rule, be executed in the name of an attorney.⁴ Nor can the representative, by a power of attorney which no will has authorized, transfer the entire management of the estate which he represents so as to bind creditors and interested parties.⁵

¹ *Trattle v. King*, T. Jones, 170.

² *Barnett v. Guildford*, 11 Ex. 20, 32.

³ *Supra*, § 109; *Driver v. Riddle*, 8 Port. (Ala.) 343; *Bird v. Jones*, 5 La. Ann. 645.

⁴ 9 Co. 75 b; *Wms. Exrs.* 943, 951, and Perkins's note; *Williams v. Mattocks*, 3 Vt. 189; *Berger v. Duff*, 4 Johns. Ch. 368.

⁵ *Neal v. Patten*, 47 Ga. 73.

CHAPTER II.

COLLECTION OF THE ASSETS.

§ 269. **General Duty of Executor or Administrator to collect the Effects, etc.**—It is incumbent upon every executor or administrator, upon the completion of his appointment, to take prudent measures for bringing all the personal property of the deceased for which he may be legally answerable into his actual control and possession. And there is no function of his office which calls for such energy, promptness, and discretion in its discharge as this. Collection precedes in natural order the settlement of debts and charges, and is the primary essential of prudent administration. Whoever may have been the custodian of all or particular goods and chattels of the deceased, the duly qualified legal representative should cause him to attorn or surrender possession, in order that the estate may derive the full benefit of the assets to which it is entitled. Corporeal things, and the corporeal muniments of title, the personal representative should seek to procure. And as to debts and incorporeal rights, evinced or not evinced by instruments in writing, the duty of collection on behalf of the estate applies in a correspondent sense; though here the duty of reducing to possession naturally imports the collecting on demand, by suit or otherwise, whatever may be due, and realizing the value of the thing after the method appropriate to its nature. No creditor, and not even the devisee, heir, or surviving spouse, is entitled to the possession of personal property left by the decedent, which constitutes lawful assets, as against the claim of the duly qualified executor or administrator.¹

It is the duty and right, therefore, of the executor or administrator, as soon as he shall have lawfully taken upon

¹ See Page v. Tucker, 54 Cal. 121.

himself the execution of his office, to collect and possess himself of all the assets, so that he may be enabled to meet the payment of the debts against the estate as they shall be presented. Not being permitted to delay collecting the assets until he can first ascertain the amount of the debts, the whole of the assets, for aught he can know, may be wanted for paying them; and hence it becomes his duty to collect them with all reasonable diligence; and the law supplies him with the means adequate for that end.¹ The personal property vests in the representative for paying debts immediately, and more remotely legacies or distributive shares; and, in a word, for administration according to the requirements of law, and, it may be, the provisions of the decedent's last will.

§ 270. **Statute Methods for discovering Assets in aid of the Representative's Pursuit.** — Some of our American legislatures have provided a convenient and inexpensive means of aiding the representative in his pursuit of assets, in the nature of a summary process in the probate court for citing in any suspected party and examining him upon oath before the tribunal which issued the letters. Thus, a Massachusetts statute provides that upon complaint against any person suspected of having fraudulently received, concealed, embezzled, or conveyed away any money, goods, effects, or other estate, real or personal, of the deceased, the court may cite such suspected person to appear and be examined upon oath touching the matter of the complaint. If the person so cited refuses to appear and submit to examination, or to answer the questions lawfully propounded to him, the court may commit him to jail, there to remain in close custody until he submits. The interrogatories and answers shall be in writing, signed by the party examined, and filed in court.²

The remedies thus afforded may enable the executor or administrator to push inquiries, advantageous as a preliminary

¹ See *Eisenbise v. Eisenbise*, 4 Watts, 134, 136.

² Mass. Pub. Stats. c. 133; *Arnold v. Sabin*, 4 Cush. 46; *Milner v. Leishman*, 12 Met. 320. Similar statutes are

found in other New England States. With reference to issuing a search warrant under New York statute, see *Public Administrator v. Ward*, 3 Bradf. 244.

to instituting proceedings, civil or criminal, before the usual tribunals, besides vindicating his own zeal in seeking out the property. And so favored is this summary inquisition, in connection with the settlement of estates, that parties interested may themselves invoke it against the executor or administrator, where his own conduct lays him open to a corresponding suspicion.¹ It is to be observed, however, that the statute authority usually extends only to the propounding of lawful interrogatories, and compelling the person cited to answer them; the suspected person is not to be deprived of the assistance of counsel in making his answers;² nor can the process itself avail beyond procuring a disclosure of facts to serve as the basis of proceedings elsewhere, unless, as might well be anticipated, the person, if liable and in actual possession, chooses to surrender without further resistance.³ The New York statute, however, besides aiming at this compulsory production of evidence, undertakes that the procedure shall, where the evidence justifies it, result further in a decree requiring the cited person to deliver possession summarily to the complainant, or else to furnish security to abide by the decision of the proper tribunal, and pay all damages in case the suit be determined against him.⁴

§ 271. **Special Statute Proceedings against Intermeddlers with the Assets, etc.** — In some States, under the statute, an executor or administrator may file a bill in chancery against one who intermeddles with or embezzles goods of the estate, instead of proceeding at law.⁵ And the common-law remedy against a defendant as executor *de son tort*, which often rendered one liable for large debts where only a trivial amount of property had come into his possession, is also found super-

¹ See language of statute, *supra*.

² *Martin v. Clapp*, 99 Mass. 470.

³ Lapse of time is not readily regarded as interposing a bar to such examination. *O'Dee v. McCrate*, 7 Greenl. 467.

⁴ Redf. (N. Y.) Surr. Pract. c. 17, § 3. The procedure under this New York statute assumes that the petitioner

for a citation shows reasonable grounds for the inquiry. The statute has been pronounced unconstitutional in the supreme court (not the highest tribunal in the State). *Beebe, Matter of*, 20 Hun, 462.

⁵ *Thorn v. Tyler*, 3 Blackf. (Ind.) 504; *Hensley v. Dennis*, 1 Ind. 471.

seded in some States by legislative acts, which provide that an action may be brought for the benefit of the estate to recover double the amount or value of the property which may have been alienated or embezzled by any unauthorized person before the grant of letters testamentary or of administration; only, however, on proof of wrong motive in the defendant.¹

§ 272. **Power of Executor or Administrator to enter Premises, force Locks, etc., in Pursuit of Assets.**—The old writers define with excessive caution the limitations under which the personal representative may enter premises, force locks, and the like, in the pursuit of assets for which he is answerable. Within a convenient time after the testator's death, or the grant of administration, as they admit, the executor or administrator has a right to enter the house descended to the heir, in order to remove the goods of the deceased; provided, as they add, he do so without violence, — as if the door be open, or at least the key be in the door. He has also a right, they observe, to take deeds and other writings, relative to the personal estate, out of a chest in the house if it be unlocked or the key be in it.² But, they add, although the door of entrance into the hall and parlor be open, he cannot justify forcing the door of any chamber to take the goods contained in it; but is empowered to take those only which are in such rooms as are unlocked, or in the door of which he shall find the key.³ Nor, they say, has he a right to break open even a chest.⁴

These are ancient authorities, relating chiefly, if not altogether, to controversies with the heir who occupies the dwelling-house of the decedent; and modern adjudication upon these and collateral points appear to be wanting. Yet the case of one's proceeding upon premises occupied by the deceased, to take an inventory, to procure possession of the goods and effects, or even as preliminary to all probate authority to

¹ *Roys v. Roys*, 13 Vt. 543. The common-law right of suing in trespass or trover is not otherwise restrained by this statute. *Ib.*

² *Went. Off. Ex.* 81, 202, 14th ed.; *Toller*, 255.

³ *Ib.*

⁴ *Ib.* These authorities may be found cited, *Wms. Exrs.* 926.

search for a will, is of constantly familiar occurrence. Such acts are often highly prudent, and indeed essential to be performed. The good judgment and delicate discretion of all the parties concerned, each being desirous to manifest his honest intent, furnish the best and probably the usually accepted assurance that all is lawfully and properly done; and to expect that a missing key, a forgotten combination,¹ an unruly lock, shall needs baffle a search which can only be advantageous when thorough, and that all concerned must be driven on slight obstruction into the courts, instead of the nearest locksmith's, seems absurd. It may well be presumed in these days that a deceased person of fortune has left some of his property, if not a will disposing of it all, in some place where those who survive him cannot lay hands as readily upon it as he might have done when alive; and while his own lock imported exclusion to all the world while he was owner, it does not, we apprehend, on his death import exclusion as against those on whom the title may have devolved in consequence, nor so as to prevent due ascertainment of the facts relating to that devolution of title. Indeed, for this exigency the controlling principle appears to be, as in bailments and trusts generally, that reasonable diligence and prudence should be pursued by all concerned for the welfare of the estate, according to the circumstances, and genuine good faith under all circumstances.

It is submitted, therefore, that as to the right of entering premises, forcing locks, and the like, the case of executor or administrator after qualification differs not fundamentally from that of bailee, custodian, unqualified representative, or suitable family representative; but that (1) the purpose should be a suitable one, — as to make an inventory or preliminary schedule, or to search for a will, or to take a lawful custody whether temporary or permanent; and that (2) this purpose should be executed with honesty and reasonable prudence. The application of the rule differs, however, as the proceeding on behalf of the estate proves to be resisted or

¹ For combination locks are a modern contrivance suggesting novel methods as to a prudent search of the receptacle.

not by others in interest and in possession of the premises or locked receptacle. Where there is no such resistance, it would appear that, subject to this rule of prudence and good faith, locks afford no decisive obstacle to the prosecution of one's duty in the premises, nor necessarily require a court to interpose its formal sanction; for while a custodian may usually leave locked premises and locked chests as they are, for a time and pending judicial delays, it would under some circumstances be highly perilous to do so. Where, however, others in interest and actual possession, and not mere intruders, resist a representative's proceedings, and the lock is not, so to speak, a casual obstruction left by the deceased, but their own as against him, doubtless the representative, qualified or unqualified, the bailee, or family representative, should proceed with far greater reserve; though to desist and resort to the courts does not even thus necessarily follow. Something depends, moreover, upon one's situation with reference to his decedent's chattels; as being already invested with a bailment custody, for instance, or as pursuing the search upon neutral premises. Thus, it is decided that no one in possession of a locked box belonging to the estate has any right to compel the qualified representative to give him a schedule of its contents or to impose other unreasonable preliminaries to its surrender; and it seems that locked or unlocked the box should be passed over.¹

The passages from our earlier writers have a strict reference, therefore, only to the executor or administrator who comes in collision with that especial favorite of the old common law, the inheritor of the land. The representative, in other words, cannot force his way rudely against the heir's wishes to take goods and chattels from the lands which have descended to the latter, breaking locks as he goes; though unquestionably the representative must take them or recover them by suit or without it.² In any event, the executor or

¹ See *Cobbett v. Clutton*, 2 C. & P. 471. time, the heir, it is held, may distrain them as *damage feasant*. Plowd. 280,

² If the representative be remiss in removing the goods within a reasonable 281; Cro. Jac. 204; Wentw. Off. Ex. 202; Wms. Exrs. 927.

administrator must not unreasonably defer the duty of seeking possession.

§ 273. **Duty to pursue or collect depends upon Means at Representative's Disposal.** — The duty of an executor or administrator to pursue and recover chattels depends in great measure upon the means at his command for doing so ; and the same may be said with reference to collecting dues to the estate. Whether slender assets shall be used in litigation for procuring personal property adversely held, or in realizing doubtful claims, the rule of prudence must decide ; but it is certain that the representative of an estate is not bound to litigate or to undertake the enforcement of doubtful rights on behalf of the estate out of his own means ; and if kindred, legatees, or others, interested in prosecuting the right, think the effort worth making, they should at least offer to indemnify the representative against the cost.¹

§ 274. **Duty to pursue or collect depends also upon Sperate or Desperate Character of the Claims.** — The duty to pursue or collect depends largely, too, upon the sperate or desperate character of the claim itself ; as to whether, for instance, the title of the deceased to such a corporeal thing or muniment can be clearly established against the adverse possessor or the reverse ; or again, whether such a debt or claim is probably collectible or not, considering the debtor's own solvency. A representative is not chargeable for assets, without reference to the fact whether they were good, doubtful, or desperate at the time when he assumed the trust, nor in any case, aside from the question of delinquency or culpable neglect on his part in realizing their value or procuring them according to the means at his disposal.²

§ 275. **Duty to pursue or collect depends also upon Representative's Means of Knowledge.** — The duty to pursue or collect depends also upon the means of knowledge possessed by the

¹ *Griswold v. Chandler*, 5 N. H. 492; *Andrews v. Tucker*, 7 Pick. 250; *Sanborn v. Goodhue*, 8 Fost. 48; *Hepburn v. Hepburn*, 2 Bradf. (N. Y.) 74.

² *Cook v. Cook*, 29 Md. 538; *Pool, Succession of*, 14 La. Ann. 677.

representative. Thus, an executor or administrator cannot be charged with a right of action in his decedent, when knowledge of the right was never brought home to himself, nor does he become chargeable, except with reference to the claim and the condition of the estate, when such knowledge reached him.¹

§ 276. **Legatees, Creditors, etc., have no Right to hold against Representative.** — Such is the personal representative's authority over the assets, that until he has by his acts and conduct made a virtual transfer of title to a legatee or other party in interest, such interest cannot be set up against him. Where, therefore, the residuary legatee or next of kin is suffered to remain in possession of personal property of the deceased, pending a final settlement of the estate, he is presumably a mere bailee of the property for the personal representative, and is liable to be called upon to surrender it, as the course of administration may require.² And a payment made by a debtor of the estate to any one, even to the residuary legatee or next of kin, is a mispayment, and from such person the representative may recover it.³ A creditor's claim against the estate is preferred to that of kindred or legatees; and yet not even a creditor has the right to take possession of assets for the purpose of either securing or paying himself the debt due to him; nor can he, after having obtained possession, withhold it from the representative unless the possession was obtained for that purpose, by an agreement with the deceased during his lifetime; for, otherwise, the just order for payment of debts would be defeated.⁴

§ 277. **Suing to recover Assets; Actions founded in Contract, Duty, etc., survive.** — To come now to the representative's suit for recovering assets. From very early times the rule has been, that personal actions which are founded upon any con-

¹ *Sarah v. Gardner*, 24 Ala. 719;
Lukton v. Jenney, 13 Pet. 381.

² *Carlisle v. Burley*, 3 Greenl. 250.

³ *Eisenbise v. Eisenbise*, 4 Watts, 134.

⁴ *Ib.*

tract, debt, covenant, or the obligation to perform a legal duty, survive the person entitled in his lifetime to sue, so that the right of action passes, upon the creditor's death, to his executor or administrator.¹ Hence, at our common law, the personal representative has the right of action to recover all debts due to the deceased, whether debts of record, as judgments or recognizances, or debts due on bonds and other contracts under seal, or debts due on simple contracts and simple promises, oral or written, which are not under seal.² Some exceptions to this rule which appear to have once prevailed were removed by the operation of statutes passed before or during the reign of Edward III., and long anterior to the establishment of the English colonies in America.³

It is said that the executor or administrator so completely represents the deceased in all such rights of action that he may enforce the obligation, notwithstanding the contract be written out and makes no reference to him. Thus, if money be expressly payable to B., the right to recover payment survives by implication to B.'s representative; and though the writing should not only omit all reference to executors and administrators, but promise payment specifically to "B. or his assigns," B.'s executor or administrator may sue upon it; for a creditor is not presumed to have assented that a debt owing him shall be lost to his estate if he dies before receiving payment.⁴

§ 278. Survival of Actions founded in Contract; Exceptions to Rule.—To the rule that every personal action founded upon a contract obligation shall survive to the personal representative, exceptions exist, deducible from the reason of

¹ 1 Saund. 216 a; stat. 31 Edw. III., c. 11; Wms. Exrs. 786; Lee v. Chase, 58 Me. 432.

² Allen v. Anderson, 5 Hare, 163; Wms. Exrs. 786; Wentw. Off. Ex. 159, 14th ed.; Carr v. Roberts, 5 B. & Ad. 78; Owen v. State, 25 Ind. 107; Bailey v. Ormsby, 3 Mo. 580.

³ See as to action of account, stats. 1 Edw. I., stat. 1, c. 3; 25 Edw. III., c.

5; 31 Edw. III., c. 11; Wms. Exrs. 786. A bond or covenant to indemnify survives to the representative. Carr v. Roberts, 5 B. & Ad. 78.

⁴ Hob. 9; Wentw. Off. Ex. 215, 14th ed.; Wms. Exrs. 789; Prec. Ch. 173. And see as to expressions "heirs," "next of kin," etc., 11 Vin. Abr. 133, pl. 27; Wms. Exrs. 787; Carr v. Roberts, 5 B. & Ad. 78; §, *post*.

the contract relation itself. Thus, where purely personal considerations are of the foundation of the contract, as in the case of principal and agent, or master and servant, the death of either party puts an end to the relation and its incident obligations.¹

And wherever the contract right is by plain intendment coterminous with the decedent's life, or dependent upon some condition which necessarily fails by reason of his death, the representative can take no succeeding advantage under the contract, but at the utmost only such advantage as may have accrued to the decedent during his lifetime, and was not actually enjoyed by him.² Life insurance contracts, too, may from their very nature be so framed that the money shall, upon the death of the person insured, enure directly to the benefit of particular survivors, and not his general estate; while, notwithstanding, the representative might be *pro forma* a nominal party to the suit on the beneficiary's behalf to recover the money.³

§ 279. **Actions founded in an Injury to Person or Property died with the Person at Common Law; Later Variations of this Rule.**—But as to actions founded, not in contract, but in some injury done either to the person or the property of another, and for which only damages are legally recoverable by way of recompense, the earlier doctrine of the common law has been that the action dies with the person for the want of litigants; dies, that is to say, whether with the person who committed or the person who suffered the wrong.⁴ Hence, the executor or administrator of the injured party could not bring an action in former times for false imprisonment, assault or battery, or other physical injury suffered by his decedent.⁵ Nor could he sue for torts affecting the feelings or reputation of his decedent, such as seduction, libel,

¹ Willes, J., in *Farrow v. Wilson*, L. R. 4 C. P. 745; c. *post*.

² Hob. 9, 10; Prec. Ch. 173; Wms. Exrs. 789.

³ *Supra*, § 211; *Lee v. Chase*, 58 Me. 432.

⁴ Wms. Exrs. 790; 1 Saund. 216, 217, notes.

⁵ *Ib.*; *Smith v. Sherman*, 4 Cush. 408; *Harker v. Clark*, 57 Cal. 245.

slander, deceit, or malicious prosecution.¹ So, too, all right to recover for injuries done to the freehold—nay, perhaps to personal estate also—was excluded by the death of the owner.²

Statutes, however, passed in the reign of Edward III., changed considerably a rule often quite disadvantageous to estates of the dead, in its practical operation, by opening a wider door to executors and administrators who sought to recover damages for wrongs suffered during life by those whose estates they represented. Trespasses committed in carrying away personal property of the decedent during his lifetime, whereby the assets which reached the executor's hands became necessarily impaired in value, first attracted the attention of the English Parliament; and statute 4 Edw. III. c. 7 placing the executor, as to all such trespassers, upon the same footing which his testator would have occupied had he still remained alive, the next step was to accord similar benefits to the estates of such as might die intestate.³ By an equitable construction of these statutes, an injury done to the personal estate of the decedent during his lifetime became distinguished from that suffered by his person, so that in effect an executor or administrator might have the same action for any injury done to the personal estate of the deceased during his lifetime, whereby it had become less beneficial to the representative than it

¹ Long v. Hitchcock, 3 Ohio, 274; Walters v. Nettleton, 5 Cush. 544; Nettleton v. Dinehart, 5 Cush. 543; Deming v. Taylor, 1 Day, 285; Wms. Exrs. 793; McClure v. Miller, 3 Hawks. 133; Miller v. Umberhower, 10 S. & R. 31. Action for criminal conversation does not survive. Clark v. McClellan, 9 Penn. St. 128. Nor an action for expenses incurred by the testator or intestate in defending against a groundless suit. Deming v. Taylor, 1 Day, 285.

² Wms. Exrs. 793; 1 Saund. 216, 217, notes.

The form, rather than the substance, of this distinction between actions founded in contract and actions founded

in a wrong, appears to have been insisted upon in the earlier authorities. Thus it was said, that in cases where the *declaration* imputes a tort done either to the person or property of another, and the *plea* must be "not guilty," the rule was *actio personalis moritur cum persona*. Hence, the doubt formerly entertained whether *assumpsit* would lie for or against an executor; because the action was in form *trespass* on the case, and therefore supposed a wrong. Wms. Exrs. 789; Plowd. 180; Cro. Jac. 294; 2 Ld. Raym. 974.

³ 1 Saund. 217; Cro. Eliz. 384; stats. 4 Edw. III.; 15 Edw. III., c. 5; Wms. Exrs. 790.

should have been, as the deceased himself might have had if living, whatever the form of action.¹

§ 280. **The same Subject.**—Where, therefore, the personal representative can show that damage has accrued to the personal estate of the deceased, through breach of the defendant's express or implied promise, the later rule is that he may sue at common law to recover damages, even though the action itself sound in tort. As where the attorney is sued for his negligence in investigating a title upon which a transfer of property depended.² Or where one contracting for safe carriage receives an injury which results in a loss of his baggage;³ notwithstanding an action for the graver personal injury might have died with the sufferer. As these statutes, nevertheless, made no change in the earlier law, so far as the survival of actions for injury done to the freehold was excluded, some fine distinctions have been made by the courts in applying this later rule; distinctions founded in the essential differences between real and personal property.⁴

¹ Trespass or trover may, accordingly, be brought by the executor or administrator. Cro. Eliz. 377; *Manwell v. Briggs*, 17 Vt. 176; *Potter v. Van Vranken*, 36 N. Y. 619. Debt on a judgment against an executor suggesting a *devastavit*. 1 Salk. 314. Action against a sheriff for the default of himself or his deputy to the loss of the right sued upon or its proper security. 2 Ld. Raym. 973; *Paine v. Ulmar*, 7 Mass. 317; 4 Mod. 403; 12 Mod. 72; Wms. Exrs. 791.

² *Knights v. Quarles*, 4 Moore, 532.

³ *Alton v. Midland R.*, 19 C. B. N. s. 242.

⁴ See preceding section. Thus, by the equity of statute 4 Edw. III., c. 7, the executor or administrator of a lessee might maintain an ejectment suit founded on transmission by death of a title to chattels real. Wms. Exrs. 793; *Doe v. Porter*, 3 T. R. 13. But actions for ob-

structing rights, diverting a watercourse, and the like, did not survive to the representative. 1 Saund. 217 a; Wms. Exrs. 793. Nor could the representative maintain trespass *quare clausum fregit*, nor an action merely for cutting down trees, or growing corn, etc., or for other waste committed on the freehold during the lifetime of the decedent. Wms. Exrs. 793; *Williams v. Breedon*, 1 B. & P. 329; Wentw. Off. Ex. 163, 14th ed. And yet for corn and wood of the decedent cut and carried away during his life it would appear that the executor might bring his action; for severance converts property from real to personal, and what was carried away and capable of being carried became movable and assets. *Williams v. Breedon*, 1 B. & P. 330. So where grass is mowed and carried off as hay, trespass is maintainable. Wms. Exrs. 794; Wentw. Off. Ex. 167; *Halleck v. Mixer*,

But the decisions are somewhat confusing on this point; and it must not be supposed that the mere form of action shall conclude the question of survival of the right to sue; for it is the gist, rather, and substance of the action that must determine. The principle of the common-law distinction is still that the executor or administrator shall enforce contract rights of action as collector or custodian of the decedent's personal estate, and not pursue wrongs for which the decedent might have sought a personal redress in damages;¹ a distinction not easily maintained, however, as one perceives when he reflects that our modern incorporeal personal property, with its claims and demands of various kinds, has expanded in sense far beyond the ancient theory of a simple *chose in action* or debt, which needed only to be reduced into the representative's possession or collected. Pursuing that distinction, judicial policy pronounces finally against the survival of an action for breach of promise to marry to the plaintiff's representative, unless, perhaps, as rarely happens, the foundation of damage alleged is the loss of plaintiff's personal property in consequence; and, indeed, there are very sound reasons why such a cause of action should not be permitted to survive at all. And so with respect to actions against physicians for malpractice,² or against an attorney through whose unskilful management his client was incarcerated.³ For though the form of action may be contract, the damage, substantially, laid in such cases, and for which recovery is sought, is in reality mental or physical suffering inflicted upon the person of the decedent through the defendant's

16 Cal. 574. Whether injury to growing crops might be sued for, on the doctrine of a constructive severance and emblements, is sometimes considered. *Wms. Exrs.* 793; 70 Me. 219.

¹ *Chamberlain v. Williamson*, 2 M. & S. 408; *Smith v. Sherman*, 4 Cush. 408; *Kelley v. Riley*, 106 Mass. 341; *Hovey v. Page*, 55 Me. 142; *Harrison v. Moseley*, 31 Tex. 608. But *cf. Shuler v. Millsaps*, 71 N. C. 297, *contra*, where

the death was that of the defendant instead. Upon the subject of breach of promise to marry, see, generally, *Schoul. Hus. & Wife*, §§ 40-51.

² *Wms. Exrs.* 801; *Long v. Morrison*, 14 Ind. 595.

³ *Wms. Exrs.* 801. *Cf. Knight v. Quarles, supra.* And see language of Lord Ellenborough in *Chamberlain v. Williamson, supra.*

negligence or misconduct. And, notwithstanding the general rule, the same considerations do not always appear to have moved the court where the plaintiff sufferer dies first, as where one survives the defendant and seeks to hold the defendant's estate liable for his own redress.¹ Yet the law as to survival of actions is usually defined as the same whether plaintiff or defendant dies, and reciprocal in its operation.

§ 281. **The same Subject; Replevin, Detinue, etc., by the Representative.**—If goods or chattels of the decedent, taken away during his lifetime, continue *in specie* in the hands of the wrong-doer after his death, replevin and detinue will lie for the representative to recover back the specific things.² And for the conversion of such goods or chattels an action lies by the executor or administrator as representative of the deceased to recover their value.³ In general, goods or chattels taken away, which continue as such in the hands of the wrong-doer, can be recovered by the representative; or, if sold, an action for money had and received will lie to recover their value.⁴

§ 282. **The same Subject; Modern Statutes affecting the Rule.**—Modern local statutes are frequently explicit as to the right of action by or against the personal representative, founded in a tort; and the right of action is thus extended in terms more or less specific. The obvious tendency of our later legislation is to remove the old barriers which obstructed the survival of actions, so as to give an aggrieved person's estate the benefit of pecuniary compensation. Thus,

¹ Actions of deceit, as in the sale or exchange of property, do not at common law survive. *Cutting v. Tower*, 14 Gray, 183; *Newsom v. Jackson*, 29 Geo. 61; *Coker v. Crozier*, 5 Ala. 369; *Henshaw v. Miller*, 17 How. (U. S.) 212; *Grim v. Carr*, 51 Penn. St. 533; *Wms. Exrs.* 793, note by Perkins.

² *Wms. Exrs.* 787; 1 Saund. 217 n.; *Jenney v. Jenney*, 14 Mass. 232; *Reist*

v. Heilbrenner, 11 S. & R. 131; *Elrod v. Alexander*, 4 Heisk. 342.

³ *Wms. Exrs.* 787; *Jenney v. Jenney*, *supra*; *Willard v. Hammond*, 1 Fost. 382; *Eubanks v. Dobbs*, 4 Ark. 173; *Mannell v. Brigga*, 17 Vt. 176; *Charlt. (Ga.)* 261.

⁴ *Potter v. Van Vranken*, 36 N. Y.

619.

in Massachusetts, it is now provided that all actions which would have survived, if commenced by or against the original party in his lifetime, may be commenced and prosecuted by and against his executors and administrators.¹

Actions of replevin, actions for goods taken and carried away or converted by the defendant to his own use, and actions against sheriffs for malfeasance or nonfeasance by themselves or their deputies, are among the causes specially enumerated in American local statutes;² causes, some of them, fairly privileged in this respect, irrespective of such legislation. In various States, actions for libel, or slander, are now found thus to survive;³ also actions for seduction;⁴ actions for deceit;⁵ and actions for malpractice by a physician, apothecary, or attorney.⁶

So, too, is a modern legislative disposition strongly manifested to enlarge and confirm the representative's remedies for such torts as may have been committed against the person of the decedent. Thus, a Massachusetts statute provides that the following (among other causes specified) shall survive in addition to the actions which survive by the common law; actions of tort for assault, battery, imprisonment, or other damage to the person.⁷ The sweeping language of kindred enactments in some other States confers a survival of actions *ex delicto*, still more comprehensive.⁸ And under the operation of appropriate practice acts, the executor or administrator of any person who might have sued in his own name, during his life, for personal injuries sustained by

¹ Mass. Pub. Stats. c. 166, § 1. An action against an apothecary for negligently selling a deadly poison as a harmless medicine will consequently survive. *Norton v. Sewall*, 106 Mass. 145.

² *Smith v. Sherman*, 4 Cush. 408; *Norton v. Sewall*, 106 Mass. 143.

³ *Nutting v. Goodridge*, 46 Me. 82.

⁴ *Shafer v. Grimes*, 23 Iowa, 550.

⁵ *Haight v. Hoyt*, 19 N. Y. 464.

⁶ *Long v. Morrison*, 14 Ind. 595; *Miller v. Wilson*, 24 Penn. St. 114.

⁷ Mass. Pub. Stats. c. 165, § 1. The

words "damage to the person" in this statute do not include torts not directly affecting the person, but only the feelings or reputation, such as breach of promise, slander, or malicious prosecution. *Norton v. Sewall*, 106 Mass. 143; *Nettleton v. Dinehart*, 5 Cush. 543; *Conly v. Conly*, 121 Mass. 550.

⁸ *Shafee v. Grimes*, 23 Iowa, 550. See also *Adams v. Williams*, 57 Miss. 38. Actions for malicious arrest and imprisonment survive. *Huggins v. Tole*, 1 Bush. 192; *Whitcomb v. Cook*, 38 Vt. 477.

reason of the negligence of some town in keeping its highways, or through the culpable carelessness of some railway or other common carrier, may sue as representative where his decedent died, having a cause of action.¹

§ 283. **The Subject continued; Action for Damages in causing Death.** — A remarkable instance in which the rule of survival of actions has been enlarged, relates to instantaneous death. At the common law an action could not be brought by one's executor or administrator to recover damages for causing the decedent's death; for the death of a human being afforded no ground of an action *ex delicto*, even when caused by another's wrongful act or neglect.² In view, chiefly, perhaps, of the great damages to which travellers in great numbers have become exposed in these modern days of coach, railway, and steamboat transportation, the peculiar trust they are compelled to repose in those who undertake to carry them, and the sound policy of holding transporting companies to the exercise of a reasonable care and diligence in managing their perilous business, statutes, both English and American, have been enacted during the present century, providing in substance that damages may be recovered, not only for personal injuries, but for causing one's death wrongfully and carelessly. Many of these statutes are explicitly directed against railway and other passenger carriers; but inasmuch as modern invention tends in various other instances to place individuals within the power of corporations and private persons who undertake to perform a service, — to say nothing of killing by assault and premeditated violence, such as the criminal codes of all ages more especially provide for, — the humane and prudent legislation of the nineteenth century takes often in England and the United States a more general scope.

Of this latter character is the English statute 9 and 10 Vict. c. 93, which enacts that whensoever the death of a

¹ See Wms. Exrs. 792, note by Perkins; Hooper v. Gorham, 45 Me. 209; Demond v. Boston, 7 Gray, 544. stat. 9 & 10 Vict. c. 93; Carey v. Berkshire R., 1 Cush. 475; Wyatt v. Williams, 43 N. H. 102.

² Wms. Exrs. 797, citing preamble of

person shall be caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, then, and in every such case, the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.¹ Corresponding enactments are to be found in most parts of the United States, extending to corporations as well as individuals, causing such damage or death.² Actions, under statutes of this character, are sometimes to be brought in the name of the State, and as though by instituting a sort of criminal prosecution against a corporation; and even where the action is brought as a mere civil action in the name of the executor or administrator, the benefits are made to redound, as far as possible, to a surviving spouse, children or parent, immediately, rather than for the purpose of supplying assets for the decedent's general estate.³

The broad underlying principle of all such legislation is to render persons liable in damages for inflicting an injury wantonly or negligently, whether the innocent sufferer by such tort dies before recovering recompense or not, whether death ensues instantaneously or later.

§ 284. **The same Subject; Actions founded on Wrongs done to Real Estate, etc.** — Actions founded on wrongs done to the freehold during the decedent's life did not, as we have remarked, survive at the common law.⁴ Hence, the personal representative could not maintain trespass, *q. c. f.*, nor sue for merely cutting down trees or for committing waste on

¹ Stat. 9 & 10 Vict. c. 93, cited Wms. Exrs. 796.

² Richardson v. N. Y. Central R., 98 Mass. 85; Whitford v. Panama R., 23 N. Y. 465; Glass v. Howell, 2 Lea, 50.

³ Stat. 9 & 10 Vict. c. 93; Wms. Exrs. 797, and note by Perkins. And *cf.* in general, Sherm. & Redf. on Negligence; Cooley on Torts; Bigelow on Torts, etc., where the subject is more properly discussed at length. The practitioner will be guided by the statutes

of his own State, and local decisions in construction of the same.

The right of a representative to sue under modern statutes, such as we have denoted in this and the preceding section, does not necessarily depend upon the question whether the deceased left a wife or family, but upon the common-law right of the injured person to sue if he were living. See Quin v. Moore, 15 N. Y. 432.

⁴ *Supra*, § 279.

the decedent's real estate during his lifetime.¹ Nor could he sue for diverting a water-course, obstructing lights, and the like.² But this left injuries to a decedent's real property, committed during his lifetime, wholly unredressed. Hence, the English statute 3 & 4 Wm. IV. c. 42, § 2, reciting this palpable injustice, enacts that executors and administrators may, within a year after a decedent's death, bring actions for any injury to his real estate committed within six months before his death.³ And legislation in various parts of the United States upholds, in more ample terms, the survival of actions to the personal representative, for damage done to real as well as personal estate.⁴

Such damages when recovered by the personal representative appear to belong fitly to the personal estate of the decedent;⁵ the right of action and money compensation being, in essence, personal and not real property.

§ 285. **Actions upon Covenants Real, etc.; Whether Representative may sue.**—But the right of action on behalf of a decedent's real estate has been denied to the personal representative in various instances, on the principle that, the land having descended to the heirs or vested in devisees, the right of action vests more appropriately in them. Where a covenant is purely collateral and does not run with the land, but its benefit, if unbroken, would pass to the representative as personal estate, it would appear to follow the usual rule of contracts as to survivorship; that is to say, the right of action for its breach passes, upon the death of the party, to his executor or administra-

¹ *Williams v. Breedon*, 1 B. & P. 329; *supra*, § 279.

² *Wms. Exrs.* 793; 1 *Saund.* 217, note; *Kennerly v. Wilson*, 1 *Md.* 102. A representative cannot bring an action on the case for overflowing the lands of the decedent during the latter's lifetime. *McLaughlin v. Dorsey*, 1 *Har. & M.* 224; *Chalk v. McAlily*, 10 *Rich.* 92.

³ *Wms. Exrs.* 795, 796.

⁴ *Mass. Pub. Stats.* c. 165, § 1; *How-*

cott v. Warren, 7 *Ired. L.* 20. An action of tort for damages caused by one's mill-dam may thus survive. *Brown v. Dean*, 123 *Mass.* 254. But not an action at law for fraudulent representation inducing one to part with real estate. *Legate v. Moulton*, 115 *Mass.* 552. See, however, *Cheney v. Gleason*, 125 *Mass.* 166, as to the equity rule.

⁵ So provided in stat. 3 & 4 Wm. IV. c. 42; *Wms. Exrs.* 796.

tor, and constitutes personal assets.¹ And hence, it is held that for breach of a covenant not to fell or lop off certain trees expressly excepted out of a lease of lands, the lease having been granted by the decedent during his life, and the breach occurring before his death, the lessee may be sued by the personal representative.² So, too, that the executor of a tenant for life may sue for the breach of a covenant to repair, incurred by his lessee during the testator's lifetime.³ For, unless the case be such that the heir or devisee alone could have sued, the personal representative is the proper person to bring the action, if a suit be maintainable at all.

But where the covenant runs with the freehold, the right to sue will pass to the heirs of the covenantee or his assigns, and thus in many instances to the exclusion of the executor or administrator; as where breach is made of the covenant of warranty contained in a conveyance.⁴ And it is observable that a covenant running with the land may thus go to the heir, notwithstanding the covenant does not mention the heir, but specifies inaccurately the covenantee and his executor or administrator.⁵ According to the earlier authorities, if a covenant running with the land was broken during the lifetime of the testator or intestate, the executor or administrator might sue upon it, doubtless on the theory that damages for such breach ought to be regarded as part of the decedent's personal estate devolving upon him.⁶ This rule still applies where the ultimate dam-

¹ *Supra*, § 279.

² *Raymond v. Fitch*, 2 Cr. M. & R. 588. Unless the executor had the power to sue, observes Williams, all remedy was lost, for the trees being thus excepted from the demise, the heir or devisee of the land, on which the trees grew, could not sue for a breach of covenant, whether incurred before or after the death of the covenantee. Wms. Exrs. 807.

³ *Ricketts v. Weaver*, 12 M. & W. 718. And it is not needful that the executor in such a suit aver damage to his testator's personal estate. Leases

or chattels real, we are to observe, constitute personal property, being estates less than a freehold.

⁴ Touchst. 175; Wms. Exrs. 801.

⁵ *Lougher v. Williams*, 2 Lev. 92.

⁶ *Lucy v. Levington*, 2 Lev. 26; Com. Dig. Covenant B, 1; Wms. Exrs. 801; *Clark v. Swift*, 3 Met. 390; 4 Kent Com. 472; *Burnham v. Lasselle*, 35 Ind. 425. An action for damages for non-performance of a sealed agreement to convey land is to be brought by the personal representative and not by the heir of the covenantee. *Watson v. Blaine*, 12 S. & R. 131.

age was sustained in the lifetime of the ancestor; as where, for instance, he is actually evicted from the land through the failure of the warranted title, or by some breach of a covenant for quiet enjoyment.¹ But the later English decisions so far qualify the older rule on this point as to hold that damage not ultimately sustained during the decedent's lifetime, upon a covenant which runs with the land, is not to be sued upon by the executor or administrator; and that even though a formal breach of such a covenant may have occurred before the ancestor died, yet if the ultimate and substantial damage was not until after the ancestor's death, the real representative, and not the personal representative, becomes the proper plaintiff.²

Where a reversion is for years, the executor or administrator is the proper party to sue on a covenant made with the lessor, whether it run with the land or not.³

§ 286. **The same Subject; Breach of Covenant in Deed or Lease.**—Executors and administrators may sue, therefore, upon breaches of covenant under a deed relating to the realty which have occurred during the life of the decedent, so as to impair his personal estate;⁴ also upon covenants in an underlease carved out of a leasehold estate.⁵ Whether breaches occur in a lease before or after the lessor's death, the term of the lease continuing, the right of action is in the executor or administrator; and this applies to the covenant for payment of rent.⁶

¹ Wms. Exrs. 801; *Grist v. Hodges*, 3 Dev. L. 198.

² Wms. Exrs. 803, 804; *Kingdon v. Nottle*, 1 M. & S. 355; *King v. Jones*, 5 Taunt. 418; 4 M. & S. 188. Weighty authorities in the United States are against the decision of *Kingdon v. Nottle*, *supra*, and in support of the doctrine that the breach of a covenant against incumbrances is broken immediately by any subsisting incumbrance; and, consequently, that the grantor or his personal representative may sue upon it. 4 Kent Com. 472; *Hamilton v.*

Wilson, 4 Johns. 72; *Chapman v. Holmes*, 5 Halst. 20; *Mitchell v. Warner*, 5 Conn. 497; *Garfield v. Williams*, 2 Vt. 327; *Wilde, J.*, in *Clark v. Swift*, 3 Met. 390.

³ Wms. Exrs. 808. Executor of tenant for years comes expressly within the stat. 32 Hen. VIII. c. 34. *Ib.*

⁴ *Knights v. Quarles*, 4 Moore, 532; *Taylor Landl. & Ten.* § 459.

⁵ *Ib.*

⁶ *Taylor Landl. & Ten.* § 459. See c. *post*, as to a representative's power to deal with leases.

§ 287. **Action for disturbing Possession; Pew, Lease, etc.**— A pew being treated in some States as personal property, the executor or administrator exercises the usual rights as to disposing of it or rendering it otherwise profitable to the estate. Before distribution of the estate he may occupy it himself or let it, and if strangers interfere with its use or with his obtaining rent for it from others in his representative character, he may declare for an injury since the death of his testate or intestate.¹ Even where the law prevails that pew-holders have an estate in the nature of a right of occupancy subject to the superior rights of the society owning the fee of the church, the same doctrine appears tenable, the heirs acquiescing, unless it is shown that the property has been distributed to the heirs, or at all events gone into their possession and control.²

So may the representative as such maintain *quare impedit* for a disturbance in his own time, or ejectment upon an ouster after his testator's or intestator's death,³ where the latter had a lease for years or from year to year.

§ 288. **In General, Personal Representative sues for Assets of the Estate.**— In general, a suit in law or equity to recover the personal assets of an estate, must be brought by the personal representative.⁴ An order from the probate court or ordinary is not usually needed for the representative to bring his suit, unless perhaps it be against the heirs.⁵

§ 289. **Suits, whether to be brought by Representative in his own Name, or as Representative.**— As a general rule, the executor or administrator cannot sue in his individual name for demands due in his decedent's lifetime to the estate which

¹ Perrin v. Granger, 33 Vt. 101; 1 Schoul. Pers. Prop. 158.

² Ib.

³ Doe v. Porter, 3 T. R. 13; Cro. Eliz. 207; 4 Co. 95 a; Wms. Exrs. 878.

⁴ Pope v. Boyd, 22 Ark. 535; Hellen v. Wideman, 10 Ala. 846; Johnson v. Pierce, 12 Ark. 599; Brunk v. Means, 11 B. Mon. 214; Snow v. Snow, 49 Me. 159; Sears v. Carrier, 4 Allen, 339; Cheely v. Wells, 33 Mo. 106; Howell

v. Howell, 37 Mich. 124; Woodin v. Bagley, 13 Wend. 453; Clason v. Lawrence, 3 Edw. 48; Pauley v. Pauley, 7 Watts, 159; Linsenbigler v. Gourley, 56 Pa. St. 166; Middleton v. Robinson, 1 Bay (S. C.) 58; Davis v. Rhame, 1 McCord Ch. 191; Baxter v. Buck, 10 Vt. 548; Webster v. Tibbits, 19 Wis. 438.

⁵ Jordan v. Pollock, 14 Ga. 145; Reid v. Butt, 25 Ga. 28.

he represents, but must sue in his representative character ;¹ while upon demands created since his decedent's death the reverse holds true.²

But to this doctrine are apparent exceptions. Thus, an executor or administrator may sue in his own name, without declaring his representative character, on a note given to him for the purchase-money of goods sold by him belonging to the estate of the decedent.³ Or upon any negotiable note or other instrument which he holds, whose tenor makes it payable to bearer ;⁴ for possession of such an instrument is sufficient *prima facie* evidence of title to the holder. Or on a promissory note payable to himself individually, which he has taken in settlement or compromise of a debt or demand due the estate.⁵ And an executor or administrator may in his own name sue to recover the price of personal property sold by him at public or private sale.⁶ So has he been allowed to bring an action of replevin for property of the deceased in his own name.⁷ It may often be more convenient for the representative to sue individually in such instances, and he is not debarred from so doing.

§ 290. **The same Subject; General Principle as to suing in Representative's Individual or Official Name.**—The common-law distinction, as laid down in some well-considered American cases, is this : Where the right of action accrued to the testator or intestate in his lifetime, or to the executor or administrator after the death of the testator or intestate, either upon a contract express or implied, made with the testator or intestate, or for an injury done to the property of the testator or intestate during his lifetime, the executor or administrator should sue in his representative character. But where the right of action accrues to the executor or administrator upon a contract made by or with him as such,

¹ Tappan v. Tappan, 10 Fost. 50; Patchen v. Wilson, 4 Hill (N. Y.) 57.

² Kline v. Gathart, 2 Penn. 491.

³ Evans v. Gordon, 8 Port. (Ala.) 346; Goodman v. Walker, 30 Ala. 482; Oglesby v. Gilmore, 5 Ga. 56; Gunn v. Hodge, 32 Miss. 319; Catlin v. Underhill, 4 McLean, 337.

⁴ Lyon v. Marshall, 11 Barb. 241; Brooks v. Floyd, 2 McCord, 364; Holcombe v. Beach, 112 Mass. 450.

⁵ McGehee v. Slater, 50 Ala. 431.

⁶ Laycock v. Oleson, 60 Ill. 30.

⁷ Branch v. Branch, 6 Fla. 314.

since the death of the testator or intestate, or for an injury done to, or a conversion of, the property of the testator or intestate in the hands or possession of the executor or administrator after the death of the testator or intestate, the action may and ought to be brought in the proper name of the executor or administrator, but not as such.¹ This distinction does not absolutely apply, however, to suits upon negotiable instruments, nor is it uniformly observed in the practice of our States. And we should conclude that the representative's right to sue, whether officially or in his own name, is to a great extent optional on his part, or else determined by the tenor of the instrument sued upon.

Where the executor or administrator sues on a contract made with his testator or intestate, he must, under such a rule, sue necessarily in his representative character, although the time for payment or performance had not arrived when the testator or intestate died.²

§ 291. **This Principle applied in suing for Torts done to the Property.** — Where goods and chattels which belonged to the decedent at the time of his death are afterwards tortiously taken or wrongfully converted, the personal representative may sue in his own name without calling himself executor or administrator; for the property vested in him on the death of his testator or intestate, and hence the wrong may be considered as done to himself.³ And such is the special property of the executor or administrator in the decedent's goods and chattels, as title he may assert or not, that according to the better opinion the personal representative has the option, when he sues in damages for the tort thus committed, either to sue in his own representative capacity and declare as executor or administrator, or to bring the action in his own

¹ *Stewart v. Richey*, 2 Harr. 164; *Kline v. Gathart*, 2 Penn. 491. And see *Thornton v. Smiley*, 1 Ill. 13; *Patchen v. Wilson*, 4 Hill, 57; *Carter v. Estes*, 11 Rich. 363; *Manwell v. Briggs*, 17 Vt. 176; *Carlisle v. Burley*, 3 Greenl. 250.

² *Bronson, J., in Patchen v. Wilson*, 4 Hill, 57.

³ *Patchen v. Wilson*, 4 Hill, 57, 58; *Carlisle v. Burley*, 3 Greenl. 250; *Sims v. Boynton*, 23 Ala. 353; *Skelheimer v. Chapman*, 32 Ala. 676; *Gage v. Johnson*, 20 Miss. 437.

name and in his individual character.¹ Not only may trover or trespass be maintained, and other actions of tort upon this principle, but likewise replevin.²

An action may be brought by the personal representative in his own name, accordingly, notwithstanding the tort was committed after the death of the testate or intestate, before letters were issued or a probate granted ;³ and, we may add, whether the representative was ever actually possessed of the the goods or not.⁴

In suing thus, in an action of trover, the executor or administrator may, if he bring the action in his own representative name, either allege that his testator or intestate was possessed of the goods, and the defendant, after his death, converted them, or that he himself was possessed as such executor or administrator, and the defendant converted them.⁵

§ 292. **Suits on Contracts made with the Representative.**— Upon a contract expressed or implied, made with the executor or administrator as such, after the death of his testator or intestate, the action may be brought by the representative in his own name ;⁶ though the opinion best sanctioned by English and American authorities is, that he may elect to sue either in his individual or his representative capacity.⁷ As upon a contract made with reference to the sale or disposition of particular assets, or to recover the price thereof.⁸

¹ *Bollard v. Spencer*, 7 T. R. 358; *Hollis v. Smith*, 10 East, 295; *Ham v. Henderson*, 50 Cal. 367.

² *Branch v. Branch*, 6 Fla. 314. There may be trespass for wasting and destroying as well as for carrying away the goods of the decedent. *Snider v. Croy*, 2 Johns. 227.

³ *Wms. Exrs.* 876; *Bollard v. Spencer*, 7 T. R. 358; *Hollis v. Smith*, 10 East, 294; *Ham v. Henderson*, 50 Cal. 369; *Wms. Exrs.* 630, 637, 877.

⁴ *Hollis v. Smith*, 10 East, 294; *Valentine v. Jackson*, 9 Wend. 302. *Buller, J.*, in *Cockerill v. Kynaston*, 4 T. R. 281, is overruled on this point. *Wms. Exrs.* 876.

⁵ *Wms. Exrs.* 877. The personal representative, either as such or in his own name, may sue the sheriff for the escape of one in execution on a judgment recovered by him in his representative capacity. *Bonafous v. Walker*, 2 T. R. 126; *Crawford v. Whittal*, Dougl. 4, note.

⁶ *Stewart v. Richey*, 2 Harr. 164, and other cases, *supra*, § 290. Otherwise where the contract was made with the testator or intestate himself. *Ib.*

⁷ *Wms. Exrs.* 878, and *Perkins's* note.

⁸ *Evans v. Gordon*, 8 Port. 346; *Oglesby v. Gilmore*, 5 Ga. 56; *Laycock v. Oleson*, 60 Ill. 30; *Gunn v. Hodge*, 32 Miss. 319; *Goodman v. Walker*, 30

Or for money lent by him as executor or administrator.¹ And in various cases where assumpsit is maintainable for recovering money paid by the representative to the use of the defendant.² It is observable that contracts made by a representative bind him individually; and yet that of such contracts, some may be within the clear scope of one's official authority and some without it; and hence, perhaps, is a source of confusion in drawing the line. Were the contract clearly without the scope of his representative capacity, he would probably be compelled to sue upon it as an individual, if he could sue at all.

On all causes of action, therefore, accruing after the decedent's death and included within the scope of his official powers, the preferable rule is that an executor or administrator may sue, either in his own individual or his representative capacity, at his option;³ and it is well established by the later cases that this option may be exercised by the personal representative wherever money recovered upon the contract made with him will be assets;⁴ though some of the older cases appear to have insisted strenuously that he must sue as an individual.⁵

§ 293. **Suit by Representative on Promissory Note or Other Negotiable Instrument.**—With respect to negotiable instruments, there are various decisions, pointing to the conclusion that if a bill be indorsed to A. B. as executor, he may declare accordingly in suing the acceptor;⁶ and that an executor or administrator may sue as such on a promissory note given to him in that capacity after the death of his tes-

Ala. 482; Catlin *v.* Underhill, 4 McLean, 337; Patterson *v.* Patterson, 59 N. Y. 574; Haskell *v.* Bowen, 44 Vt. 579; Eagle *v.* Fox, 28 Barb. 473; Peebles *v.* Overton, 2 Murph. 384.

¹ 3 B. & Ald. 365; Gallant *v.* Boute-flower, 3 Dougl. 34.

² 3 B. & Ald. 365; Cowell *v.* Watts, 6 East, 405; Ord *v.* Fenwick, 3 East, 103; Wms. Exrs. 879.

³ Mowry *v.* Adams, 14 Mass. 327; Merritt *v.* Seaman, 6 Barb. 330; Knox *v.*

Bigelow, 15 Wis. 415; Lawson *v.* Lawson, 16 Gratt. 230.

⁴ Wms. Exrs. 881, and cases cited; Abbott *v.* Parfitt, L. R. 6 Q. B. 346; Heath *v.* Chilton, 12 M. & W. 637; Cowell *v.* Watts, 6 East, 410; Bolingbroke *v.* Kerr, L. R. 1 Ex. 222; Bogs *v.* Bard, 3 Rawle, 102.

⁵ 10 Mod. 315; 3 B. & P. 11; Wms. Exrs. 881.

⁶ King *v.* Thom, 1 T. R. 487; 10 Bing. 55.

tate or intestate.¹ Also, that upon an instrument payable to the deceased by name or his order, and coming to the hands of his executor or administrator, the latter may sue in his representative character.²

Upon a bill, note, or other negotiable instrument, which by suitable indorsement, or according to its original tenor, becomes payable to the bearer, the executor or administrator who holds it, may, undoubtedly, like any "bearer," sue in his own name.³ And he may sue in his own name on a promissory note payable to himself individually, which he takes upon a transaction made with himself in the course of settling the estate, and in general on a note given him in the course of his own dealings with the estate.⁴ If payable to him individually or as bearer, his suit in his own name follows the familiar rule applied to negotiable instruments. And even if specifically payable to A. B., described as executor or administrator, he will not be required to prove his fiduciary character, for the words descriptive of such character in the instrument may here be regarded as immaterial.⁵

Our conclusion, therefore, is that where the personal representative receives a negotiable instrument whose avails when collected will be assets belonging to the estate, he may prosecute not only in his own right, but (though it be given to him after the decedent's death) at his option in his representative character instead.⁶

§ 294. General Conclusion as to Suing upon Contracts in the Individual or Representative Character.—The principle of those older cases, which insisted upon one's individual suit, appears

¹ Partridge v. Court, 5 Price, 412; s. c., 7 Price, 591; Wms. Exrs. 880.

² Murray v. E. I. Co., 5 B. & Ald. 204. And see Baxter v. Buck, 10 Vt. 548.

³ Holcombe v. Beach, 112 Mass. 450; Lyon v. Marshall, 11 Barb. 241; Brooks v. Floyd, 2 McCord, 364; Sanford v. McCreedy, 28 Wis. 103; Rittenhouse v. Annerman, 64 Mo. 197.

⁴ Laycock v. Oleson, 60 Ill. 30; Evans v. Gordon, 8 Port. 346, and other cases cited *supra*, § 292.

⁵ Laycock v. Oleson, 60 Ill. 30.

⁶ An administrator in his representative capacity may sue as bearer on a note payable to the intestate or bearer, although such note was not delivered until after the death of the intestate. Baxter v. Buck, 10 Vt. 548. See *c. post* for application of this principle to administration *de bonis non*; Barron v. Vandvert, 13 Ala. 232; Catherwood v. Chabaud, 1 B. & C. 150.

to have been that the executor or administrator, by the contract made with himself, changed the nature of the debt originally due to his testate or intestate; and it was thought that if this were done the representative ought to sue for the new debt in his own name, and not in his representative character.¹ It would seem still, according to English authority, that if the executor or administrator plainly changes the nature of the debt, as by taking a bond from a simple contract debtor, though the bond be given to him as executor or administrator, the creation of a new personal obligation of a higher nature precludes his suit in the representative capacity upon such an instrument.² But we may question the reasonableness of the exception, and prefer to extend the modern doctrine of a representative's option to such a case; for courts should lean against a judicial construction which tends to deprive a plaintiff of just remedies, by leaving him in a perilous dilemma as to the forms he should pursue.

§ 295. **Prosecution of Suits in Equity by the Personal Representative.**—The executor or administrator of a deceased party may, in respect of the transmission of the interest to him, be admitted as his representative in a suit in equity. Formerly a bill of revivor was necessary; but modern chancery practice, aided by the legislation of later times, favors a continuance of the suit by a mere order to revive, the representative appearing or being summoned to prosecute or defend.³

All equitable interests of the deceased, in the nature of assets, are justly enforceable in a court of equity by the executor or administrator suing in his representative capacity. Thus, a bill in equity will lie by an executor or administrator against the general agent of his testate or intestate for a discovery and an account of the latter's transactions with his principal;⁴ or for discovery of the personal estate of

¹ Wms. Exrs. 881; 10 Mod. 315; *v. Gleason*, 125 Mass. 166; Mass. Pub. Helm *v. Van Vleet*, 1 Blackf. 342. Stats. c. 165, § 19; *Egremont v. Thompson*, L. R. 4 Ch. 448. See the statutes

² Wms. Exrs. 882; *Price v. Moulton*, 10 C. B. 561; *Partridge v. Court*, 5 Price, 419. of the respective States for the modern chancery practice in relation to

³ Wms. Exrs. 890; *Daniell Pract.* 785; 15 & 16 Vict. c. 86, § 52; *Cheney* ⁴ *Simmons v. Simmons*, 33 Gratt. 451. reviving suits in equity.

the deceased;¹ though, in this respect, local statutes in the United States prefer an inexpensive summary proceeding in the probate court against persons suspected of concealing or embezzling the property;² or to compel a legatee to refund a legacy on good reason, such as a deficiency of assets;³ or, similarly, for reimbursement of sums paid to creditors beyond personal assets;⁴ or to restrain a receiver of letters from the decedent from publishing them;⁵ or to procure title to specific assets which stand through some fraud or mistake in another's name, so that he cannot assert his rights at law.⁶

§ 296. **Proceedings to obtain Possession of Specific Negotiable Instruments, etc., belonging to the Estate.**—Where notes or other negotiable instruments against various parties, which belonged to the decedent, and were formerly held by him, have come into the hands of a third party under an indorsement and delivery fraudulently obtained, the representative has the right to sue for their value at law, as for a tort. But he may, instead, proceed to obtain the specific instruments; and where replevin does not furnish an adequate remedy, he may bring a bill in equity to compel the delivery of the specific instruments to himself, and to restrain the holder from prosecuting suits at law upon such instruments, or parting with their possession; joining as parties to the bill those indebted upon the instruments. He should elect, however, whether to proceed thus for the specific chattels incorporeal, or to sue for their value.⁷

§ 297. **Pursuit of Assets where Decedent fraudulently transferred.**—The representative's duty in pursuing assets extends to all assets of the decedent which are applicable to

¹ 1 Vern. 106.

² *Supra*, § 270.

³ *Doe v. Guy*, 3 East, 123.

⁴ *Williams v. Williams*, 2 Dev. Ch. 69.

⁵ *Thompson v. Stanhope*, Ambl. 737; *Queensberry v. Shebbeare*, 2 Eden, 329.

And see 2 Story Eq. Jur. § 946 *et seq.*; *Wms. Exrs.* 1901. As to prosecuting a bill in equity to recover land or its

specific avails, still held by a party to a fraud upon the decedent, see *Cheney v. Gleason*, 125 Mass. 166. No relief afforded in equity on the ground of mistake, where the representative was culpable. *Stewart v. Stewart*, 31 Ala. 207.

⁶ *Burrus v. Roulhac*, 2 Bush, 39.

⁷ *Sears v. Currier*, 4 Allen, 339. And see *Morton v. Preston*, 18 Mich. 60.

the payment of debts.¹ Not only may he in some instances set up fraud to defeat the decedent's own act, but he may institute proceedings for setting aside a fraudulent transfer made by the decedent; and if he neglects doing so, to the injury of creditors and others concerned in such assets, he renders himself liable as for other malfeasance or non-feasance in the performance of his trust, and under like limitations.²

The executor or administrator may consequently maintain an action at law, or suit in equity, for the purpose of setting aside a transfer or conveyance of property made by his decedent for the purpose of defrauding his creditors, notwithstanding the decedent himself would have been barred.³ For a personal representative is not estopped by the acts and conduct of his testator or intestate under all circumstances; but is bound to settle the estate as justice and the interests of all concerned, in their turn, may demand.

§ 298. **Representative's Power to Compromise or Arbitrate.**—As incidental to the power to sue and collect, the executor or administrator ought to have a right to arbitrate or compromise any demand of the decedent which he represents, provided he act within the range of a reasonable discretion as to the true interests of the estate. Nevertheless, as will hereafter appear, the responsibility is a perilous one, according to numerous authorities, unless reduced by express statute.⁴

¹ *Welsh v. Welsh*, 105 Mass. 229.

² *Supra*, § 220; *Wms. Exrs.* 1679, and note by Perkins; *Cross v. Brown*, 51 N. H. 488; *Lee v. Chase*, 58 Me. 436; *Danzey v. Smith*, 4 Tex. 411. But the representative should usually bring proceedings specially to recover property fraudulently transferred by the decedent. He cannot, it is said, avoid a contract made by the decedent on the ground that it was made in fraud of creditors. See *Pringle v. McPherson*,

² *Desau.* 524. But *cf.* cases cited above.

³ *Martin v. Root*, 17 Mass. 222; *Gibbens v. Peeler*, 8 Pick. 254; *Judson v. Connolly*, 4 La. Ann. 169; *Morris v. Morris*, 5 Mich. 171; *Brown v. Finley*, 18 Mo. 375; *McKnight v. Morgan*, 2 Barb. 171.

⁴ See *Wms. Exrs.* 1799-1801; c. 5, *post*, as to the liability of an executor or administrator.

§ 299. **Effect of Contract or Covenant to the Decedent, which did not name his Executors, Administrators, etc.** — A contract or covenant which confers a valuable right or cause of action, is well expressed to be for the benefit of "A., his executors or administrators," or with some similar expression, for its intent then is plainly not limited to a recovery by A. in person. But, on the other hand, a limitation of the benefit to A. in person, and that its enjoyment shall depend upon the precarious tenure of his life, is not to be presumed; though every contract or covenant should be interpreted according to its plain or natural sense as being founded in personal considerations or the reverse. Hence, where a cause of action accrued in the lifetime of the decedent on a contract or covenant made to him without naming "executors or administrators," such cause of action, generally speaking, will pass to the personal representative for the benefit of the estate.¹ And even though, because of the terms of such contract or covenant, as, for instance, in requiring performance at a future date, the cause of action did not actually accrue, or become enforceable until after the decedent died, the executor or administrator is not precluded from enforcing it at the proper time.²

§ 300. **The same Subject; Effect where the Expression "Assigns," "Next of Kin," "Heirs," etc., is used** — The effect is the same usually where the expression "A. or his assigns" is used exclusively or in connection with a reference to executors or administrators. For where the scope of such a contract favors such intendment, as it usually does, the executor or administrator is assignee in law and entitled. Hence, if money be payable to "A. or his assigns," the executor or administrator may generally recover upon the promise.³ So, too, where the agreement was to pay money or deliver goods to "A. or his assigns" by a certain day; or to grant a lease

¹ Wms. Exrs. 789, 884; *supra*, § 277. B., his executor or administrator may

² Wms. Exrs. 884; § 304, *post*, as to sue for it. *Ib.*

rights accruing after decedent's death. ³ Wms. Exrs. 789; Went. Off. Ex. Plowd. 286; 2 P. Wms. 467. Thus, 215; Hob. 9; 1 Leon. 316. where money is expressly "payable to

to "A. and his assigns" before Christmas.¹ And this, notwithstanding the intervening death of A.; inasmuch as his legal assignee is not by such circumstance precluded from enforcing the right, unless it was plainly personal to A. and conditioned upon his life.¹

But it is different where, on the other hand, by "assigns" was evidently meant an assignee in fact.² And, generally, where A. has, in exercise of his right of dominion, assigned and transferred the cause of action during his life to some third person, the title has been so diverted as not to be transmissible legally to his executor or administrator.

So truly, indeed, is one's executor or administrator his most appropriate representative or assignee in law upon his death, in obligations not actually assigned by the decedent, nor plainly intended to cease or devolve in title differently, that the word "heirs" or "next of kin," introduced into the language of an agreement, will not confer upon such parties the right to pervert assets to their own use, nor to supersede or participate in the lawful functions of the personal representative whom the law clothes with authority to settle and wind up the estate.³

§ 301. **Right of Representative to distrain or sue for Rent in Arrears.** — Where a lessee for years underlets the land and dies, his personal representative may distrain at common law for the arrears of rent which became due in the lifetime of the deceased; because these arrears were never severed from the reversion, but the executor or administrator has the reversion and the rent annexed thereto, in the same plight as the deceased himself had it.⁴ And statute 32 Hen. VIII. c. 37, extended this remedy to the executors and administrators of persons seized of various other interests in land short of

¹ Plowd. 288; Wms. Exrs. 884, 885; Went. Off. Ex. 14th ed. 215.

² As where the condition of a bond was to pay a certain sum to such a person as the obligee should by his last will in writing appoint it to be paid; and the obligee died making no such appointment by his will. For here the

intent evidently was to pay to an appointee, not to the executor. Hob. 9; Wms. Exrs. 886.

³ 11 Vin. Abr. 133, pl. 27; Wms. Exrs. 787; Carr v. Roberts, 5 B. & Ad. 78; *supra*, § 277.

⁴ 1 Robt. Abr. 672; Latch. 211; Wms. Exrs. 927.

an inheritance, such as an interest for one's own life or for another's life;¹ and, moreover, to the executors and administrators of tenants in fee.² Hence the personal representative became permitted generally to distrain for arrears of rent due the decedent in his lifetime.³

But distress for rent is a remedy now abolished in various parts of the United States. And doubtless, for arrears of rent, which, consistently with the doctrine of apportionment, belongs to the estate of a decedent, as assets, his personal representative may sue, as a living landlord might have done.⁴

§ 302. **Rights of Personal Representative upon Conditions made with the Deceased.** — In general, a condition stipulated with the deceased may enure to the benefit of the estate through the personal representative. Thus, to quote the old books, where cattle, plate, or other chattels were granted by the testator upon condition that if A. did not pay such a sum of money, or do some other act as the testator appointed, etc., and this condition is not performed after the testator's death, now is the chattel come back to the executor, and he may maintain an action respecting it.⁵

§ 303. **Right accruing to Personal Representative by Chattel Remainder, etc.** — A right to sue, which never existed in the testator or intestate, may likewise accrue to the executor or administrator by chattel remainder. As where (to cite the old books again) a lease is made to B. for life, the remainder to his executors for years; or where a lease for years is bequeathed by will to A. Although B. never had the term in it, nor the right to sue while he lived, yet the term shall devolve on his executors who may maintain an action in respect of it.⁶

¹ Co. Lit. 162 a; Wms. Exrs. 928-931; 1 Ld. Raym. 172; 1 Freem. 392.

² Ib. - Stat. 3 & 4 Wm. IV. c. 42, extends the right to distrain to a demise for any term or at will. Wms. Exrs. 931. And see stat. 4 Geo. II. c. 28; Taylor Landl. & Ten. § 560.

³ As to apportionment of rent see

supra, § 216. And see *Wright v. Williams*, 5 Cow. 501.

⁴ As to ejectment, see power over real estate, *post*.

⁵ Went. Off. Ex. 14th ed. 181; Wms. Exrs. 886.

⁶ Went. Off. Ex. 14th ed. 181, 189; Co. Lit. 54 b; Wms. Exrs. 697, 885.

§ 304. **Right accruing to Personal Representative in his Time and after the Decedent's Death.** — Besides the instances just noticed, of rights accruing by condition, remainder, etc., to the executor or administrator, there are others analogous where the deceased himself could not have sued, because of the peculiar tenor of the contract or covenant in question and the date of his death, and yet the right of action would accrue to the representative in his time. That the right of action did not accrue to the testator or intestate himself, is not fatal to the right of his representative; but the right itself being valuable, the representative may avail himself of it at the proper time.

Thus, as the old books state, if A. covenants with B. to make him a lease of certain land by such a day, and B. dies before the day, and before any lease made, if A. refuse to grant the lease, when the day arrives, to the executor of B., the executor shall have an action as such on the covenant. And where the father, in an early case cited by the English court of chancery, possessed of a term for years and renewable every seven years, assigned this lease in trust for himself ~~for~~ life, remainder in trust for the son, his executors, administrators, and assigns, and the father covenanted to renew the lease every seven years as long as he should live; and the son died and the seven years passed, upon which the executors of the son brought a bill to compel the father to renew the lease at his own expense; the decree was made accordingly.¹ So upon a covenant to grant a lease to A. before Christmas; or upon a contract to deliver a horse to A. on a given day;² or upon an agreement to stand to the award of certain persons, whose award was to pay unto A. by a certain day; notwithstanding A. dies before the time appointed, the promise confers a valuable right upon which A.'s executor or administrator may recover as assets for the benefit of the estate and compel performance.

¹ *Husband v. Pollard*, cited 2 P. Wms. 467. his executors or administrators," etc., in such contract or covenant. See *supra*,

² 1 Leon. 316; Plowd. 288; Wentw. § 299. As to the effect of the word Off. Ex. 215; Wms. Exrs. 884, 885. "assigns," see *supra*, § 300. There is no necessity for naming "A."

§ 305. **Rights of Personal Representative as to Pledge, Collateral Security, etc.** — It was formerly said that where no time was limited for the redemption of a pledge, the pledgor had his whole lifetime to redeem unless quickened by a notice *in pais*, or through the intervention of a court of equity.¹ But our modern rule of limitations regards a barrier of years rather than the uncertain duration of one human life; and hence lapse of time, irrespective of life or death, affords the true test; subject to which restriction, the right to redeem will pass to the personal representative of the deceased pledgor.² The death of the pledgee does not impair the pledgor's right to redeem, for tender may be made to the executor or administrator of a deceased pledgee.³

If a time be limited for payment of a debt, and the redemption of the pledge or collateral security given, and the pledgor die before the appointed time, his executor or administrator may redeem in his stead at the day and place agreed upon.⁴

A pledge of property belonging to the estate, though it were to secure the person who provided the funeral, cannot avail against the decedent's personal representative, when made by intermeddlers in the assets and without authority from him; but should the representative have sanctioned or participated in the pledge, he cannot so repudiate the transaction afterwards as to be absolved of liability.⁵ The personal representative's pledge of assets for his private debt is, of course, a misappropriation, and such assets may in general be recovered without repaying the loan.⁶ An executor's or

¹ 2 Kent Com. 582; Story Bailm. §§ 345-348, 362; 1 Bulst. 29; Bac. Abr. Bailment, B.

² Schoul. Bailm. 224; Cortelyou v. Lansing, 2 Cain. 200; Perry v. Craig, 3 Mo. 516; Jones v. Thurmond, 5 Tex. 318.

³ Schoul. Bailm. 224; Story Bailm. §§ 345-348.

⁴ Bac. Abr. Bailment, B; Wentw. Off. Ex. 181; Wms. Exrs. 886. In equity the value of the property, beyond the money paid for it, shall belong

to the estate; though in law a somewhat different doctrine appears to have prevailed where the representative redeemed with his own funds. Wms. Exrs. 1661; Wentw. Off. Ex. 186, 187.

⁵ Jones v. Logan, 50 Ala. 493. If not at the time qualified for the office, he is nevertheless estopped, it would appear, by his own wrong, though not to the injury of the estate; but proof of his presence and passive assent does not, it is held, sufficiently charge him. Ib.

⁶ State v. Berning, 74 Mo. 87. As

administrator's duty to redeem a pledge follows the rule of prudence; for if the estate he represents is to be worse by such redemption, the preferable course seems to be, to let the secured creditor avail himself of the pledge and stand on the usual footing of creditors for his balance.¹

§ 306. **Collection of Debts with Security; changing or renewing the Security.** — Debts with mortgage or other security may be collected on maturity and the security discharged; or, if the debtor prove delinquent, the security may be enforced for the benefit of the estate. So, too, if the representative act fairly and with becoming prudence, the security may be renewed or changed while the debt remains outstanding; but to give up good security and leave the claim insufficiently secured, is an act of imprudence, and may charge the representative personally.² Loans upon security are often treated as permanent investments, and accordingly sold and transferred instead of being called in.³

§ 307. **Gathering the Crop or Emblements.** — Since growing crops on the land of the decedent are assets, the personal representative has a right to enter and take them, for he is accountable therefor. This right of entry and possession cannot be divested by any legal stratagem so as to deprive one's executor or administrator of his right to gather the crop; and if interrupted in the reasonable exercise of his right by any third person, he may oppose him by force, or, if forcibly molested, may have the offender indicted.⁴

§ 308. **Want of Diligence or Good Faith in collecting Assets.** — If the executor or administrator fails to use due care and diligence in collecting and procuring assets, considering the means at his disposal, he will be held liable for their full

to the rights of a *bond fide* pledgee in such cases, see Schoul. Bailm. 174, c. 4, *post*.

¹ See payment of claims, c. *post*; Ripley v. Sampson, 10 Pick. 373. And see Eidenmuller's Estate, Myrick (Cal.) 87.

² See Baldwin v. Hatchett, 56 Ala. 561.

³ See next chapter as to investments, etc.

⁴ State v. Hogan, 2 Brev. 437. See as to procuring an order from the probate court to sell or cultivate a crop, McCormick v. McCormick, 40 Miss. 760. And see McDaniel v. Johns, 8 Jones L.

value. As where he receives notes not shown to be desperate, and makes no effort to collect them.¹ Good faith, too, should always characterize the representative's dealings with the assets, in order to absolve him from a strict personal liability for their value.²

Hence, an executor or administrator who has been guilty of gross negligence or wilful default in failing to collect a debt due the estate will be personally charged with the debt, and sometimes with interest besides.³ But he is absolved, on the other hand, whenever he can show that his conduct was such as a prudent man, in the management of his own business, would have displayed, and that he had made proper exertion to collect, and had acted in good faith.⁴

§ 309. **Collection of Interest-bearing Debts; Usury, etc.** — Interest-bearing debts due the estate are to be collected, upon the usual observance of diligence and good faith, with interest as well as principal.⁵

¹ *Lowson v. Copeland*, 2 Bro. C. C. 156; *Clack v. Holland*, 19 Beav. 271; *Gates v. Whetstone*, 8 S. C. 244. See next chapter as to the measure of a representative's liability; and as to whether "slight diligence" or "ordinary diligence" should be the standard. The English doctrine inclines to the former test, and the American to the latter.

² *Whitney v. Peddicord*, 63 Ill. 249. See next chapter.

³ *Tebbs v. Carpenter*, 1 Madd. 290; *Wms. Exrs.* 1806; *Schultz v. Pulver*, 3 Paige, 182; *Brazeale v. Brazeale*, 9 Ala. 491; *Brandon v. Judah*, 7 Ind. 545; *Scarborough v. Watkins*, 9 B. Mon. 540; *Smith v. Hurd*, 8 Sm. & M. 682; *Holcomb v. Holcomb*, 11 N. J. Eq. 281; *Charlton's Estate*, 35 Penn. St. 473; *Southall v. Taylor*, 14 Gratt. 269; *Oglesby v. Howard*, 43 Ala. 144.

⁴ *Bryant v. Russell*, 23 Pick. 546; *Moore v. Beauchamp*, 4 B. Mon. 71; *Glover v. Glover*, 1 McMull. Ch. 153; *Bowen v. Montgomery*, 48 Ala. 353; *Neff's Appeal*, 57 Penn. St. 91; *Gray v.*

Lynch, 8 Gill, 403. The rule of the text applies with its qualification where the representative forbears suing, takes security, etc., and the debtor absconds or proves insolvent. See *Holmes v. Bridgman*, 37 Vt. 28; *Keller's Appeal*, 8 Penn. St. 288. Or subjects the estate to the liability of surety or indorser, when there was a principal debtor to pursue. *Tuggle v. Gilbert*, 1 Duv. 340; *Chambers' Appeal*, 11 Penn. St. 436; *Utley v. Rawlins*, 2 Dev. & B. Eq. 438; *Keller's Appeal*, 8 Penn. St. 288. It is not culpable negligence to omit suing a debtor who is without means. 7 Gratt. 136, 160. A delay to press claims on an administrator's part, because a will is discovered whose production for probate is expected, is indulgently treated. *Hartsfield v. Allen*, 7 Jones L. 439.

⁵ To charge the representative with receiving usurious interest in fulfilment of the decedent's contract with the debtor, it should be shown that he accepted the money with knowledge of the usury. *Ossipee v. Gafney*, 56 N. H. 352.

§ 310. **What may be taken in Payment; Private Arrangements with Debtor, etc.**—Debts to be settled beneficially are usually to be paid in money or its equivalent. But it is held no breach of trust for the personal representative to receive as money that which, by the law of the land, is declared to be lawful currency and a legal tender in payment of debts; nor, thus receiving, is it obligatory upon him to account in coin for such assets.¹

Land should not be taken in payment of debts, if its proceeds may be had instead; for a personal representative is not legally capable of dealing with such property and transferring title in a satisfactory manner.² But receiving personal property of the debtor or its avails or the proceeds of his real estate, in satisfaction of the debt, or taking security, real or personal, for a future settlement, may be not only prudent but highly advantageous in the interests of an estate; and the representative who deals thus with a failing debtor, in the exercise of ordinary care and diligence, will not be chargeable for such of the indebtedness as he fails eventually to realize.³ To accept, however, in satisfaction of a manifestly good and collectible claim, the assignment or transfer of property comparatively worthless betrays culpable negligence if not positive dishonesty.⁴

A personal representative who is himself indebted to a debtor of the estate, may, if he chooses, accept a dis-

¹ Jackson v. Chase, 98 Mass. 286. There are various cases, in the reports of our Southern States, somewhat in conflict, which consider this principle in connection with confederate money issued during the rebellion of 1861. See Glenn v. Glenn, 41 Ala. 571; Copeland v. McCue, 5 W. Va. 264; Lagarde, Succession of, 20 La. Ann. 148; Shaw v. Coble, 63 N. C. 377; Hendry v. Cline, 29 Ark. 414. Fraudulently to permit the discharge of a debt in such depreciated currency cannot be upheld. Williams v. Skinker, 25 Gratt. 507. But *bond fide* and prudent dealing should excuse one. Hutchinson v. Owen, 59 Ala. 326.

² Weir v. Tate, 4 Ired. Eq. 264. He is chargeable with the price allowed by him for the lands unless those entitled to the estate elect to take it. *Ib.*

³ Neff's Appeal, 57 Penn. St. 91.

⁴ Bass v. Chambliss, 9 La. Ann. 376; Parham v. Stith, 56 Miss. 465; Scott v. Atchison, 36 Tex. 76. The rules concerning application of proceeds in payment of debts apply in favor of representatives. Frith v. Lawrence, 1 Paige, 434. The representative may execute a release, though he may make himself liable for a *devastavit*. Caldwell v. McVicar, 12 Ark. 746.

charge of his own debt towards the payment due him in his fiduciary capacity, but, so doing, he makes himself answerable to the estate for the whole debt so settled.¹ If he receive a note or other security in his individual right for a debt due the estate, he is liable over to the estate, but the transaction as between himself and the debtor remains valid.²

§ 311. **Liability where Property is taken or Money collected by Mistake as Assets.**—Where property is taken or money received by the representative, through mistake, as assets, he must restore or refund to the party rightfully entitled. Applying the same in course of administration does not excuse him.³

¹ Alvord v. Marsh, 12 Allen, 603.

the estate is discountenanced by statute in some States. Johnson v. Brown, 25 Tex. 120.

² Biscoe v. Moore, 12 Ark. 77; Ross v. Cowden, 7 W. & S. 376. The practice of selling claims against an estate to be used as offsets against debts due

³ McCustian v. Ramey, 33 Ark. 141.

CHAPTER III.

CARE, CUSTODY, AND MANAGEMENT OF THE ASSETS.

§ 312. **Care, Custody, and Management of Assets an Important Function.** — The care, custody, and management of the personal property or personal assets belonging to the estate is an important function of administration. The funds having been gathered in for the purpose of making disbursements in due order to creditors, legatees, and those entitled to the surplus, which disbursements must be made upon careful deliberation in order to be made safely, it may happen that a very large fortune is left in the keeping of the personal representative for a considerable period of time, much of it to be placed on deposit or kept in securities capable of being quickly converted into cash. To manage such a fund prudently may involve the collection of accruing dividends, interest, and income, and perhaps in instances of necessary delay, an investment or re-investment of funds, and the putting of money or other personal property to such temporary use as may bring in a profit. Funds of the deceased left invested as he placed them require a like prudent supervision. A will, too, may direct investments to be made.

§ 313. **Executor or Administrator how far regarded as a Bailee in Respect of Responsibility.** — There is a certain standard of responsibility by which the personal representative's liability in this connection should be measured. Courts have defined that standard in many instances as in essence the responsibility of a bailee; of a gratuitous bailee or of a bailee for recompense, as the case may be. Such a test is certainly a convenient one; and especially where applied to what is strictly the care and custody of assets already in the corporeal possession of the executor or administrator.

But this fundamental doctrine of administration responsibility extends to the manner of procuring and collecting the assets, of managing the available funds, of making sales, of paying out, of distributing and winding up, and, in a word, of appropriating the decedent's estate to the just purposes of administration. The underlying principle, therefore, like that applicable to all trustees, is not, perhaps, coincident with the law of bailments as commonly expounded, but rather, transcending the limits of that law, advances what we may call the bailment standard of accountability to the domains of another relation, distinct, though in most respects analogous, namely, the fiduciary one.¹

§ 314. **As to Care and Custody ; Responsibility of Executor or Administrator like that of the Bailee.**—As for the simple care and custody of the personal property reduced to his corporeal possession and control, whether it be of things literally corporeal or of securities which represent incorporeal money rights, the executor or administrator is certainly bound like a bailee in point of responsibility, according to the current of modern opinion. Thus, if personal property belonging to the estate be destroyed or captured by a public enemy, or perish, or deteriorate from some internal defect, or through the operation of natural causes, or in general, because of inevitable accident, the executor or administrator who has honestly exercised ordinary care and diligence in averting or lessening the mischief, escapes personal liability for the loss. He is himself no insurer against accidents,² though average prudence as to certain kinds of property might perhaps have required him to keep the property insured against loss by fire.³

¹ See Schoul. Bailments, 1-5.

² See Schoul. Bailm. 104 ; Croft v. Lyndsey, 2 Freem. 1.

³ *Seemle*, according to earlier cases, that the personal representative is not bound to insure or continue insurance on the decedent's property. Bailey v. Gould, 4 Y. & C. 221. But prevailing

usage among prudent business men in any age should largely affect such issues. And, however it may be as to insurance of household effects, a stock of goods in a store or warehouse is very commonly insured at this day, as also are buildings and improvements upon real estate.

§ 315. **The same Subject; Whether this Responsibility is that of a Gratuitous Bailee or a Bailee with Recompense.** — But a limitation of bailment liability, like that we have just stated, applies equally in favor of bailees with and bailees without recompense. Yet bailment responsibility differs by the well-known rule, according as the bailment responsibility in question was for the bailor's sole benefit, or for bailor's and bailee's mutual benefit; in the former case "slight" is the usual test as to the care and diligence requisite, while in the latter there must have been at least "ordinary" care and diligence exercised. In other words, a bailee serving with recompense is bound legally to the use of a greater measure of care and diligence than a bailee who serves wholly without recompense.¹

Now the fundamental English principle is, as we shall show hereafter, that an executor or administrator shall be reimbursed for his outlays, but shall have no remuneration for his own time, trouble, and responsibility in settling the estate; whereas, in most of the United States compensation is now regularly allowed him.² A corresponding difference of precedents may therefore be expected in defining the essential standard of bailment or fiduciary liability with relation to such officials. Indeed, the rule as now set forth in the English courts, both of law and equity, is that the personal representative shall not be chargeable for a loss of assets which have come into his possession, unless wilful default be shown;³ though the preferable legal statement would be that an executor or administrator stands in the condition of a gratuitous bailee, so that "slight diligence" on his part is needful, but no more.⁴ Good faith, moreover, or common honesty, is always demanded of a bailee or fiduciary. It is true that Lord Ellenborough once laid it down that the bailment theory did not apply in common-law courts, but that an executor might there be held liable for the loss of his testator's

¹ Schoul. Bailm. 43, 103.

⁴ See Wms. Exrs. 1807; Goodfellow

² *Post* as to accounts; Wms. Exrs. v. Burchett, 2 Vern. 299; Jones v. Lewis, 1852. 2 Ves. Sen. 240.

³ Job v. Job, L. R. 6 Ch. D. 562, *per* Jessel, M. R.

assets when they had once come into his hands ; and yet, supposing the courts of common law to be at variance on this point, the rule of equity must at the present day prevail.¹

On the other hand, in the courts of most or all of the United States, inasmuch as the executor or administrator is entitled to compensation for his service, we apprehend that the rule of liability must be stated more strongly, and so as to bind the representative to a measure of care and diligence corresponding to that of bailees for hire ; in other words, so as to require, besides good faith on his part, that degree of care and diligence which men ordinarily bestow in the management of their own affairs.² And such in truth is the prevalent common-law and equity rule in this country, and the doctrine most consonant to sound reason. Provided, therefore, the personal representative be brought within the protection of such a rule, having also acted *bona fide*, he will not be held liable for money of the estate stolen by burglars from his safe,³ or lost through the insolvency of the bank where he has deposited it.⁴ A court of probate acts upon equitable principles in settling the accounts of executors and administrators, and may properly allow him for losses thus excusably incurred in the course of his care and custody of the assets.⁵

§ 316. **Liability of Personal Representative in the General Management of Estate.** — This liability of a personal representative for all consequences resulting from the failure of due⁶ care and diligence or good faith, while performing his trust, is traceable in various other connections elsewhere dwelt upon in this volume. As in procuring the assets, taking possession of the

¹ *Job v. Job*, *supra*, *per* Jessel, M. R.

² *Mikell v. Mikell*, 5 Rich. Eq. 220; *Rubottom v. Morrow*, 24 Ind. 202; *Whitney v. Peddicord*, 63 Ill. 249; *Twitty v. Houser*, 7 S. C. 153; *Bosie, Estate of*, 2 Ashm. 437.

³ *Stevens v. Gage*, 55 N. H. 175. Had such representative kept a large sum of money belonging to the estate in the unlocked drawer of his desk, or deposited it with a bank known to be

crippled in resources, he would probably have been compelled to bear the loss.

⁴ *Twitty v. Houser*, 7 S. C. 153. The deposit should have been in trust. 53 Ala. 169.

⁵ *Upson v. Badeau*, 3 Bradf. Sur. 13.

⁶ *I.e.*, as the writer presumes, "slight" according to the English rule, and "ordinary" according to the American; the question of a rightful compensation furnishing the basis of a legal distinction. *Supra*, § 315.

personalty, and realizing upon notes and other causes of action ;¹ or in getting a fraudulent transfer by his decedent set aside ;² or in selling, or in transferring the assets absolutely or by way of security ;³ or in compromising claims whether against or in favor of the estate, adjusting controversies, prosecuting or defending suits, and submitting interests committed to his discretion to arbitration ;⁴ and, in general, upon his accounting with the probate court for the due performance of his official duties.⁵ So, too, as concerns the conduct of a successor with reference to investigating the acts and conduct of his predecessor.⁶ For this bailment doctrine, being founded in 'sound common sense, permits of a wide range of analogous application ; nor, indeed, has it been disregarded by the legislature in framing statutes which affect the settlement of estates of the dead, nor by courts of probate and equity, whose duty it is to take jurisdiction of such settlements.

§ 317. **Management of the Estate ; Collection of Income, etc. ; Responsibility of the Representative.**— In general the executor or administrator is required to be faithful, honest, and diligent, as to the management of assets in his hands or subject to his control. If he retains funds of the estate to meet the exigencies of his office, and so as to discharge statute allowances, debts or legacies, as they may become payable

¹ *Supra*, §§ 308, 310; *McCall v. Peachy*, 3 Munf. (Va.) 288; *Connelly's Appeal*, 1 Grant, 366; *Gates v. Whetstone*, 8 S. C. 244; *Stark v. Hunton*, 3 N. J. Eq. 300; *Neff's Appeal*, 57 Penn. St. 91.

² *Danzev v. Smith*, 4 Tex. 411; *McLendon v. Woodward*, 25 Ga. 252.

³ See next chapter; *Dugan v. Hollins*, 11 Md. 41; *Griswold v. Chandler*, 5 N. H. 492.

⁴ *Woods v. Elliott*, 49 Miss. 168; *Hoke v. Hoke*, 12 W. Va. 427.

⁵ *Post* as to accounts; *Kee v. Kee*, 2 Gratt. 116.

⁶ See c. 5, *post*; *Cock v. Carson*, 38 Tex. 284. Or even, as concerns a principal representative, with reference to

getting an ancillary appointment in order to collect assets abroad. *Williams v. Williams*, 79 N. C. 417.

The representative is chargeable with the value of personal property belonging to the estate and lost by his negligence, although it never came into his possession; for diligence in pursuing assets not in his possession is required. *Tuttle v. Robinson*, 33 N. H. 104. Not, however, certainly, as to assets of whose existence he was excusably ignorant. *Jones v. Ward*, 10 Yerg. 160.

Though an illegal bailment by the executor or administrator cannot be avoided by him, yet he may recover back the property after the bailment has expired. *English v. McNair*, 34 Ala. 40.

and ultimately for a distribution of the surplus or payment of the residue to the person or persons lawfully entitled thereto, it is incumbent on him to collect dividends, interest, or income upon invested funds, not lying idle, with the same measure of care, diligence, prudence, and good faith as applies to collecting and reducing to possession the principal of the assets.¹ And as for choosing between keeping funds invested or suffering them to lie idle, the same prudent and faithful regard for the duties of his office should afford the criterion.²

In the general management of the estate, our leading maxim still applies that honesty, reasonable³ care and proper diligence are expected from the personal representative, and ought ever to be brought to the fulfilment of the trust; but that wherever these qualities have been exercised, the representative will not be held personally responsible for losses which ordinary prudence could not foresee nor avoid, nor charged with that which he never did nor could thus have realized.⁴

§ 318. Paying Assessments; Discharging Liens, etc., upon Personal Assets. — Taxes upon the personal estate of a deceased person should be duly discharged according to law by the personal representative; not, however, without similar qualifications; for if the assets prove insufficient for discharging claims having a legal preference, the taxes he pays become eventually a disbursement from his private means. Where shares of stock owned by the decedent are of market value, it may be incumbent upon the executor or administrator, in the exercise of becoming prudence, to pay assessments thereon and redeem them for the benefit of the estate, such assessments consti-

¹ *Dortch v. Dortch*, 71 N. C. 224; *Ray v. Doughty*, 4 Blackf. 115. Usury received by the decedent or by the representative himself upon the decedent's property must be accounted for. *Proctor v. Terrill*, 8 B. Mon. 451.

² Hence, his office being primarily to gather in, disburse, and distribute with reasonable expedition, the keeping funds outstanding and productive becomes a

matter of only secondary consequence with an executor or administrator.

³ *I.e.*, "ordinary," according to the American standard, and "slight," according to the English. *Supra*, § 315.

⁴ *Voorhees v. Stoothoff*, 6 Halst. 145; *Williams v. Maitland*, 1 Ired. Eq. 92; *Webb v. Bellinger*, 2 Desau. 482; *Calhoun's Estate*, 6 Watts, 185.

tuting a lien on the shares.¹ But if the shares are worthless, and will probably continue to be so after assessments are paid, he is not justified in paying out the assets for that purpose, nor in redeeming the stock.²

The personal representative deals with liens as he finds them when his own title vests; and such liens he cannot disregard. But, as already intimated, he cannot in his representative capacity create a lien on the assets for a debt due during the decedent's lifetime so as to impair the rights of other creditors.³ Nor can he bind an insolvent estate by his agreement in such a manner as to take assets out of the legal course of distribution provided for that contingency.⁴

§ 319. **Personal Representative's Vote upon Stock.** — The assent of the personal representative, as stockholder to corporate acts requiring the stockholders' assent, may be valid, though the stock does not stand in his name, and his assent is given in his personal capacity.⁵

§ 320. **Putting Assets into a Saleable Condition, etc.; Repairing, etc.** — The representative who finds a raw commodity on hand, — tobacco, for instance, — may lawfully put it into a saleable condition, provided he act prudently or honestly, within the usual rule;⁶ and the same may be said of repairing damaged goods, or finishing up his decedent's jobs, or procuring materials for the completion of contracts which were obligatory upon the estate, especially if remunerative.⁷ But the trust moneys should not be misappropriated by the representative upon any pretext of repairing or protecting assets; nor so as to make good a loss which was occasioned by his own breach of trust; nor so as carelessly to waste the estate in needless and unremunerative expenditures.⁸

¹ Ripley v. Sampson, 10 Pick. 373; Tuttle v. Robinson, 33 N. H. 104.

² Ripley v. Sampson, 10 Pick. 373. And see Stow's Estate, Myrick (Cal.) 97.

³ Ford v. Russell, 1 Freem. Ch. 42; Ga. Dec. Part II. 7; *supra*, § 256.

⁴ James's Appeal, 89 Penn. St. 54.

⁵ Pike County v. Rowland, 94 Penn. St. 238.

⁶ Whitley v. Alexander, 73 N. C. 444.

⁷ See Oram's Estate, 9 Phila. 358.

⁸ See Lacey v. Davis, 4 Redf. (N. Y.)

§ 321. **Responsibility of Personal Representative for Acts of his own Agent, Attorney, etc.** — It is true that persons interested in an estate are not bound to pursue assets into the hands of the representative's attorney, but may hold the representative directly responsible for what the attorney obtained.¹ But, consistently with the probate and equity view of the executor's or administrator's functions, the question remains essentially one of good faith and reasonable diligence on his part. Where, therefore, acting honestly and with ordinary discretion and care, the executor or administrator entrusts claims due the estate to an attorney, he is not chargeable personally with the loss, should the attorney collect the money, apply it to his own use, and become insolvent.² But it is culpable negligence, within this rule, to employ a novice or one evidently unskilful to manage a transaction of great magnitude and difficulty when the estate could have paid for a competent person.³ Upon the same general principle, the personal representative is not responsible for a debt, lost by a mistake in pursuing remedies, where he acts in good faith and under the advice of competent counsel.⁴ Nor for the misconduct of an auctioneer, not imprudently employed by him, who sells assets and appropriates the proceeds;⁵ the representative not being remiss in taking steps for legal redress. But if the executor or administrator trusts assets in a careless manner,

¹ *Green v. Hanberry*, 2 Brock. 403. A hired bailee responds in general for the negligent and unskilful work of his own sub-agents or servants just as though his own want of ordinary diligence, not theirs, caused the damage. Schoul. Bailm. 111.

² *Rayner v. Pearsall*, 3 Johns. Ch. 578; *Christy v. McBride*, 1 Scam. (Ill.) 75. For the analogous rule of bailments, see Schoul. Bailm. 111. The scope of the sub-agent's authority is material. As to thefts, etc., outside such scope, the question is, whether the bailee used ordinary diligence in the choice and continuous employment of such person. *Ib.*

³ *Wakeman v. Hazleton*, 3 Barb. Ch.

148. And see *Marshall v. Moore*, 2 B. Mon. 69.

⁴ *King v. Morrison*, 1 Pen. & W. (Penn.) 188; 4 Johns. Ch. 619. *Qu.* whether here, if the attorney or counsel was grossly at fault, legally liable in damages, and pecuniarily responsible, the representative, in the exercise of reasonable diligence, should attempt, on behalf of the estate, to pursue him. The bailee may sue his sub-bailee for negligent performance, causing his damage. *McGill v. Monette*, 37 Ala. 49. And see *Calhoun's Estate*, 6 Watts, 185; *Telford v. Barry*, 1 Iowa, 591; *Bacon v. Bacon*, 5 Ves. 335; *Clough v. Bond*, 3 M. & Cr. 497.

⁵ *Edmond v. Peake*, 7 Beav. 239.

or to those he had no right to employ, he is liable to the estate for the ill consequences.¹

This appears decidedly the better view of the case as between the personal representative and those he may employ in the course of administration; though the old authorities sometimes laid down the rule at common law more harshly. It has been said in times past that an executor or administrator becomes responsible if his agent embezzles the funds of the estate.² But even prudent men cannot hope to manage property without errors of judgment, entailing occasional loss; and there is neither justice nor sound policy in holding the representative to the exceptional liability of an innkeeper or common carrier, especially where his service is without remuneration; he stands rather as any prudent owner of the personal property might himself were he still alive and managing his own affairs, so far as blame is concerned.

§ 322. **Duty as to investing Assets or placing the Funds on Interest.** — If, in pursuance of his trust, considerable sums of money must necessarily lie idle for some time, as where, in particular, searching out the persons entitled to the surplus is perceived to involve much delay, the personal representative is not only permitted, but encouraged, according to the usual rule, to permit quick assets which are productive to stand for a time uncollected.

In most American States, too, the executor or administrator is, by direct or indirect intendment of the law, allowed to

¹ 1 Anstr. 107; *Ghost v. Waller*, 9 Beav. 497; *Matthews v. Brise*, 6 Beav. 239.

² 6 Mod. 93; *Toller Exrs.* 426; 1 Dane Abr. 590, art. 16; *Doyle v. Blake*, 2 Sch. & Lef. 243; *Wms. Exrs.* 1816, 1820. And see Lord Cottenham in *Clough v. Bond*, 3 My. & Cr. 496. The case in 6 Mod. 93, however, raised merely a question of costs. "Generally speaking," as the old rule has been stated, "if an executor appoints another to receive the money of his testator, and he receives it, it is the same thing as if the executor himself had actually re-

ceived it, and will be assets in his hands; and, consequently, appointing another to receive, who will not repay, is a *devastavit*." *Wms. Exrs.* 1817.

Stat. 22 & 23 Vict. c. 35, § 28, confirms the general rule indicated by the English equity decisions; so that, for defaults of another employed by him, the personal representative shall only be charged for his own "wilful default." *Wms. Exrs.* 1828. This changes the old law, of course, if the law in truth were as stated above in this note. See, further, *Lyon v. Lyon*, 1 Tenn. Ch. 225.

put the money where it may draw interest, and even to invest funds in interest-bearing securities.¹ But the rule of ordinary prudence and diligence, as well as good faith, is still exacted under such circumstances; and this, moreover, with special consideration, both to the legislative policy of the State or country, as concerns investments by an executor or administrator, and the time and mode of settling the estate. For, unlike testamentary trustees, the primary duty of an executor or administrator is to settle or wind up an estate; and accordingly to reduce the assets to cash or readily convertible personalty, and pay over or transfer it to others in pursuance of the peculiar trust reposed in him. When the executor or administrator has money of the estate in his hands, and there are no reasons why he should retain it, and he has full opportunity to pay it out to the persons entitled, he has no right to retain it longer than the responsibilities of his trust make it prudent and necessary, on any pretext that he has loaned it out for the sake of interest.²

Any savings or accumulations out of the estate, together with interest, dividends, and income, become assets in the hands of the personal representative, to be divided and paid over in the same manner as the principal fund.³

Under the statutes of some States, funds collected by a fiduciary are required to be deposited with particular banks or after a particular manner.⁴ Such legislative directions should be strictly heeded. And the executor or administrator who, in connection with the deposit, enters into other transactions with the banker which deviate from the prescribed line of his duty, renders himself personally liable.⁵ But, in general, the rule of probate and equity is, that where the deposit of funds belonging to the estate was made and kept from necessity, or conformably to common and reason-

¹ *Moore v. Felkel*, 7 Fla. 44; *Dortch v. Dortch*, 71 N. C. 224. Ann. 279; *Reed v. Crocker*, 12 La. Ann. 445; *Shipley, Ex parte*, 4 Md.

² *Wood v. Myrick*, 17 Minn. 408; 493.

Dortch v. Dortch, 71 N. C. 224.

³ *Wingate v. Pool*, 25 Ill. 118.

⁴ *Livermore v. Wortman*, 25 Hun, 341; *Pasquier, Succession of*, 11 La.

⁵ *Wms. Exrs.* 1818; *Darke v. Martyn*, 1 Beav. 525; *Challen v. Shippam*, 4 Hare, 555.

able usage, and without wilful default, the personal representative shall not be chargeable with a loss.¹ We assume, of course, that the trust fund was kept as distinct from his own bank account, and that the bailment standard of care and diligence was consistently maintained.²

§ 323. *Investments, how to be made, etc.; Rule of Liability.* — The doctrine of diligence and good faith may be followed into the subject of an executor's or administrator's investments. As to the precautions to be taken and the extent to which the representative may lend with reference to the value of property for investment, where he loans upon the security of real estate mortgages, there are numerous decisions;³ and usually only what are called first-class mortgages, or mortgages whose security is of value considerably larger than the amount of the loan, should be selected.

In English practice, a trustee or executor, after a decree to account, is not permitted to lay out money on mortgage or other security, without the leave of the court.⁴ And while the American rule generally leaves more to the personal representative's own discretion, it certainly discourages long loans upon securities not easily convertible, of moneys which may be required for the immediate purposes of administration; looking rather to temporary loans and investments, and to the temporary continuance of safe securities originally received by him as assets of the estate. But should a mortgage security, prudently and properly taken, turn out bad, the fiduciary's good faith and observance of reasonable care and diligence shall shield him.⁵ In English practice, securities are highly favored for trust investments of a permanent character.⁶

¹ *Churchill v. Hobson*, 1 P. Wms. 243; *Castle v. Warland*, 32 Beav. 660; *Johnson v. Newton*, 11 Hare, 160; Wms. Exrs. 1818.

² See English stat. 22 & 23 Vict. c. 35, § 31, cited Wms. Exrs. 1828, which confirms as the true criterion of liability, the executor's or administrator's own "wilful default." But as to the American rule, see *supra*, § 315.

³ *Brown v. Litton*, 1 P. Wms. 141; *Stickney v. Sewell*, 1 M. & Cr. 8; *Ingle v. Partridge*, 34 Beav. 411; *Bogart v. Van Velsor*, 4 Edw. Ch. 718; Wms. Exrs. 1808.

⁴ Wms. Exrs. 1809.

⁵ *Brown v. Litton*, 1 P. Wms. 141. Cf. *Norbury v. Norbury*, 4 Madd. 191; *Wilson v. Staats*, 33 N. J. Eq. 524.

⁶ See Wms. Exrs. 1810. Stat. 22 &

An investment of personal assets in real estate, being technically a conversion, is not proper on the representative's part. But where it becomes necessary to save the estate from loss, it is right and even obligatory for the executor or administrator to purchase or take possession of land on the foreclosure of a mortgage belonging to the estate and hold the title for the benefit of the estate. In such case the land may be treated as personal property;¹ and if taken without breach of trust by the representative, the land may be turned over in lieu of the fund on a settlement of the estate.²

§ 324. **The Subject continued.** — Where, as in some American States, no particular restrictions are imposed by law upon the fiduciary, as to the kinds of securities in which the trust funds shall be placed, or the mode of making investments; the general rule of liability still applies which we have been discussing, viz.: that the fiduciary shall act with honor and shall exercise a sound and reasonable discretion, like men of ordinary prudence, in conducting such affairs.³ Investment in public (if not real) securities, is the usual English requirement as to trust funds;⁴ and the personal representative should, in that country, invest his unemployed money in government loans of the description authorized by the court of chancery.⁵ And although a fair and reasonable discretion as to investing upon private personal security appears in some earlier instances to have been approved, the present rule

23 Vict. c. 35, § 32, sanctions trust investments in real securities in any part of the United Kingdom. Wms. Exrs. 1811.

¹ Valentine v. Belden, 20 Hun, 537.

² Perrine v. Vreeland, 33 N. J. Eq. 102, 596.

³ Kinmonth v. Brigham, 5 Allen, 277, by Hoar, J.; Harvard College v. Amory, 9 Pick. 446.

⁴ Howe v. Lord Dartmouth, 7 Ves. 137 a. For the modern rule as to investment of a fund so bequeathed that the income shall be paid to a particular class for life, and then the principal to others, see c. as to legacies, *post*; Sar-

gent v. Sargent, 103 Mass. 297; Brown v. Gellatly, L. R. 2 Ch. 751; Wms. Exrs. 1391, and Perkins's note.

⁵ That is to say, the three per cent. consols. Holland v. Hughes, 16 Ves. 114; Wms. Exrs. 1810, 1811. Though for a purely temporary investment other descriptions of British securities are sometimes sanctioned. 6 Beav. 239. And see stats. 22 & 23 Vict. c. 35, § 32; 23 & 24 Vict. c. 38, § 12, under whose operation the choice of investment is extended to a choice not only of real securities in any part of the United Kingdom, but also of national bank stock and East India stock.

of the English courts of equity clearly establishes that an executor who lends upon the bond, promissory note, or other personal security of a private party, commits a breach of trust and shall be personally answerable for its safety.¹

But these doctrines have not been adopted in Massachusetts;² nor generally in the United States; and even were our national public securities available in this country, as they seldom have been in the English sense, State securities of the particular jurisdiction might not be thought much less desirable. The subject is, to a large extent, controlled in this country by local statutes which vary considerably in the range of selection permitted to the fiduciary. But the policy so strongly inculcated in British jurisprudence, of using accumulated wealth transmitted from the dead to the living, to strengthen the hands of government, by causing its investment in the national soil and the public debt, finds less favor in America. Here individual fortunes, so far as they remain undispersed and are left to accumulate, aid rather in stimulating private enterprises, near and remote, and in reclaiming the wilderness, and peopling and developing new States; while the nation itself makes no general directions for investment and cannot interfere.³

¹ Cf. *Webster v. Spencer*, 3 B. & Ald. 360; with *Gil. Eq.* 10; 1 Eden. 149 n.; *Walker v. Symonds*, 3 Swanst. 63; *Bacon v. Clark*, 3 M. & Cr. 294; *Wms. Exrs.* 1809.

² *Lovell v. Minot*, 20 Pick. 119.

³ Concerning investments in "Confederate securities" during the Southern rebellion of 1861, various recent decisions are found. The main question is not easily separable from perplexing issues of lawful or unlawful government; but in general the *valid act* of a State legislature authorizing investments to be made in specified securities should shield the personal representative who, in good faith and not carelessly, invests accordingly. See *Trotter v. Trotter*, 40 Miss. 704; *Manning v. Manning*, 12 Rich. Eq. 410; *Leake v. Leake*, 75 Va. 792. But in some States such invest-

ments must doubtless have been utterly illegal. *Copeland v. McCue*, 5 W. Va. 264. State securities have not in all instances been a judicious investment for trust moneys. *Perry v. Smout*, 23 Gratt. 241. See 17 Wall. 570.

Investments made by an executor voluntarily, which on application of the legatees the court would have compelled him to make, will be protected. *Bodley v. McKenney*, 9 Sm. & M. 339. When personal property is given for life generally, and the trust of investing appears to have been confided to the executor rather than a trustee, an investment should be made so as to secure interest or income to the life legatee. *Evans v. Inglehart*, 6 Gill & J. 71; legacies, *post*; *Jones v. Stites*, 19 N. J. Eq. 324; *Chisholm v. Lee*, 53 Ga. 611; *Calkins v. Calkins*, 1 Redf. 337. And

§ 325. **Liability for placing or leaving Assets in Trade, Speculation, etc.** — An administrator is not justified in placing or leaving assets in trade, for this is a hazardous use to permit of trust moneys; besides which, trading lies outside the proper scope of administration functions. Under circumstances not clearly imprudent, however, an executor may pursue an authority which was plainly conferred upon him by the will in this respect; though less as an executor, perhaps, than as one specially honored or burdened by his testator's personal confidence. Chancery protects the executor who can show his testator's express sanction, but scarcely beyond this, and chiefly so as to keep the hazardous investment under its prudent direction. To employ trust funds in trade on the representative's own responsibility has always been treated as essentially a breach of trust; and the courts have resisted much pressure to relax the rule. And the executor or administrator so employing funds of the estate has the disadvantage of incurring all the risks while he must account for all the profits.¹

For the loss of assets placed or left by him in trade, the representative may, therefore, be charged, as for his impru-

see, as to perishable property, *Woods v. Sullivan*, 1 Swan, 507. In some States the personal representative is bound to invest moneys left in his hands, after settling his accounts, within a specified period, usually six months. *Frey v. Frey*, 14 N. J. L. 71. Investments left by the decedent in a particular kind of security might, if prudent, be fairly re-invested in the same or a similar security. *Brown v. Campbell*, Hopk. 233; *Hogan v. De Peyster*, 20 Barb. 100.

Trust investments in corporate or individual bonds and notes are quite generally sanctioned in the several States; but the classes of permissible securities are often clearly specified by statute; and investment in the unsecured bond or note of an individual is not usually allowable as prudent. *Lacey v. Stamper*, 27 Gratt. 42. Municipal bonds and bank stock cannot in some States be taken without the court's permission.

Tucker v. Tucker, 33 N. J. Eq. 235. See, further, 2 Redf. (N. Y.) 333, 349, 421, 465; 35 N. J. Eq. 134, 467. Money of the estate cannot be used by the representative to protect stock which he had no right to purchase, nor in subscribing for additional stock under a privilege. *Lacey v. Davis*, 4 Redf. 402. Prudence seems to require that depreciated currency should be used in paying debts owed, as well as in receiving payment of debts due the estate. It may be deposited, but should not be hoarded. *Rogers v. Tullos*, 51 Miss. 685.

¹ *Wms. Exrs.* 1792, 1793; *Barker v. Barker*, 1 T. R. 295; *Garland, Ex parte*, 10 Ves. 129; *Perry Trusts*, § 429; *Burwell v. Mandeville*, 2 How. 560; *Pitkin v. Pitkin*, 7 Conn. 307; *Thompson v. Brown*, 4 Johns. Ch. 619; *Lucht v. Behrens*, 28 Ohio St. 231; *Stedman v. Fiedler*, 20 N. Y. 437.

dence.¹ And if he carries on the business with surviving partners of the deceased, he may incur an individual liability for the partnership debts.² But if the trade prove advantageous, the parties interested in the estate are not debarred from claiming the profits of the investment as theirs.³ Debts incurred by the representative in the prosecution of the unauthorized trade with personalty cannot be charged against the general assets, real and personal, notwithstanding an honest intention on the fiduciary's part to benefit the family of the decedent by carrying it on.⁴

But as to withdrawing assets from a partnership, or closing out a business in which the decedent was engaged, a wider discretion must occasionally be conceded to the personal representative; for this duty must be performed with a prudent regard to time, opportunity, and other circumstances. An administrator is not necessarily wanting in due care, so as to be responsible personally, if he suffer the surviving partner to remain in possession of, and sell out, the joint stock in the usual course of trade;⁵ and to thus sell out a decedent's stock in trade may be for the highest interests of the estate, provided due care be exercised in the choice of agents. And where it appears, on finally closing the partnership affairs, that the firm is insolvent, the fact that it must also have been insolvent at the decedent's death, and that the estate has actually profited by the representative's delay in withdrawing the decedent's interest from the firm, may exonerate the representative.⁶

These principles apply to speculative investments of all kinds, with the assets. The personal representative incurs all the risks and is entitled to none of the profits resulting

¹ *Thompson v. Brown*, 4 Johns. Ch. 619, and other cases, *supra*.

² *Alsop v. Mather*, 8 Conn. 584; *Muntz v. Brown*, 11 La. Ann. 472; *Stedman v. Fiedler*, 20 N. Y. 437. As to permitting a representative to enter *bond fide* into the concern to which the decedent belonged, employing his own capital, and taking no undue advantage out of the assets, see *Simpson v. Chapman*, 4 De G. M. & G. 154.

³ *Robinett's Appeal*, 36 Penn. St. 174.

⁴ *Lucht v. Behrens*, 23 Ohio St. 231; *Merritt v. Merritt*, 60 Mo. 150.

⁵ *Thompson v. Brown*, 4 Johns. Ch. 619. See also *Merritt v. Merritt*, 60 Mo. 150.

⁶ *Stern's Appeal*, 95 Penn. St. 504. Here it was shown that none of the individual assets of the estate had been adventured or lost in the business. And see next chapter as to selling out the interest in a firm.

from such transactions committed in breach of trust. But if assets came to him thus invested by the decedent, it is a question of prudence when and how he shall withdraw the fund; and though he is not justified in continuing the speculation, and involving the estate more deeply, a reasonable latitude of honest discretion should be allowed him, as to closing the transaction.¹

§ 326. **Carrying on a Trade with Assets; Liability, etc.**—The liability of a deceased copartner, as well as his interest in the profits of the concern, may, by the copartnership contract, be continued beyond his death. Without such stipulation, however, death would dissolve the firm, even where the copartnership was expressed to be for a term of years.² With such a contract the effect must be naturally to bind the estate of the deceased partner, in the hands of his executors or administrators, without compelling such representatives to become partners personally.³

The active assent and participation of the representatives in the business appears, however, to subject them to the usual individual responsibilities of representatives who make contracts after the decedent's death with reference to the estate; the immediate effect being, like that of carrying on a trade, that they have a lien on assets for their indemnity if they had power to embark the estate in trade, but otherwise no lien.⁴ Where, therefore, the business of the decedent is carried on by executors under a will, or in any case, by representatives duly empowered,⁵ and the case is not merely one of leaving passively the decedent's partnership interest in a concern, unadjusted with the survivor, the representatives incur a personal liability for the debts thereby contracted. But they have a right in equity to indemnify themselves for the payment of

¹ See *Perry Trusts*, § 454.

² *Scholefield v. Eichelberger*, 7 Pet. 594, *per* Mr. Justice Johnson.

³ *Downs v. Collins*, 6 Hare, 418.

⁴ *Laughlin v. Lorenz*, 48 Penn. St. 275; *Lucht v. Behrens*, 23 Ohio St. 231; *Gratz v. Bayard*, 11 S. & R. 41.

⁵ As in *Laughlin v. Lorenz*, 48 Penn. St. 275, where a new firm composed of the personal representatives of the decedent and the surviving partner was created.

such debts out of the property lawfully embarked in the trade.¹ Out of this right springs an equitable right of the trade creditors to resort to such fund for payment, if their remedy against the representative be unavailing.² And where a new firm is rightfully created, into which the personal representatives of the old firm enter, the creditors of the new firm are clothed with the equities of that firm against the estate of the decedent arising out of the payment by the new firm of the debts of the old.³

Where, on the contrary, the executor or administrator carries on a trade without any authority to do so, and the business proves disastrous, this will not of right involve the decedent's estate for the debts; but such assets as may be shown to have been wasted in the trade, those interested in the estate have the right to claim. The difficulties are practical ones, arising out of the representative's own insolvency, and the difficulty of tracing assets into the business.⁴ Acts of the representative *ultra vires*, moreover, or in excess of his express power to trade, do not give those dealing with him an equity against the trade assets, as the latest authorities indicate.⁵ A will may direct one's executors to carry on trade after his death, either with his general assets or by designating a specific fund to be severed from the general bulk of his estate for that purpose; the latter intention is to be preferred, as hazarding only a portion of the assets; and in no case is the creation of a trade, and more especially of a partnership liability, to be inferred without clear provisions of the will, and unambiguous acts by the representative in pursuance of the powers conferred upon him.⁶

While a testator may specifically limit the specific part of the assets which shall be used by the representative in carrying on his trade, it would appear from the principles an-

¹ Laible v. Ferry, 32 N. J. Eq. 791; Labouchere v. Tupper, 11 Moore, P. C. 198.

² Ib. The fee simple of land may thus become involved. Laible v. Ferry, *supra*.

³ Laughlin v. Lorenz, 48 Penn. St. 275.

⁴ See Garland, *Ex parte*, 10 Ves. 110; Wms. Exrs. 1793. And see Lucht v. Behrens, 23 Ohio St. 231.

⁵ Pillgrem v. Pillgrem, 45 L. T. 183.

⁶ Stanwood v. Owen, 14 Gray, 195; 104 Mass. 583; Wms. Exrs. 1793; Kirkman v. Booth, 11 Beav. 273; Jones v. Walker, 103 U. S. Supr. 444.

nounced above, that the representative himself necessarily risks his whole fortune if he actively embarks in it.¹

§ 327. **Sale Investment, etc., of Perishable Assets.**—Perishable assets, and such as naturally depreciate on his hands, the representative should seasonably dispose of, depositing moreover, or investing the proceeds, or appropriating them in some other suitable mode. It often happens that a person beneficially interested will take such assets at their just valuation.²

§ 328. **Rule as to calling in Money already out on Loan or Investment.**—Where general law, or the testator's will, sanctions only investments of a particular description, the executor or administrator cannot safely disregard its implication, that funds otherwise invested shall be promptly called in. In pursuing such a duty he should observe prudence and good faith, as in other instances; but negligence in point of time as to stocks and securities of speculating and fluctuating value is culpable, especially if payments to be made on behalf of the estate make the necessity urgent for realizing in cash promptly. Unless it appears highly probable that by delay a better price will be realized, the safer course for the fiduciary is to sell disfavored assets at an early stage of his administration, unless all the parties in interest or the court of probate or chancery expressly sanction delay.³

Nevertheless, reasonable diligence and good faith are regarded in determining the representative's liability in such cases. That the delay resulted on the whole advantageously.

¹ Garland, *Ex parte*, 10 Ves. 110; Cutbush v. Cutbush, 1 Beav. 184; Wms. Exrs. 1793; Laible v. Ferry, 32 N. J. Eq. 791.

An executor may carry on a trade as executor, but he is not the less personally liable for all the debts which he may contract in the trade. *Per* Turner, Lord Justice, in Leeds Banking Co., *Re*, L. R. 1 Ch. 231, 242.

² Woods v. Sullivan, 1 Swan, 507; Morton v. Smith, 1 Desau. 128.

³ Powell v. Evans, 5 Ves. 839; Peate v. Crane, 3 Dick. 499; Bullock v. Wheatley, 1 Coll. 130; Brazen v. Clark, 5 Pick. 96; Boyd v. Boyd, 3 Gratt. 113; Wms. Exrs. 1806, 1815; Moyle v. Moyle, 2 Russ. & My. 710. The representative, observes Lord Cottenham, is not liable upon a proper investment in an authorized fund for the fluctuations of that fund, but he is for the fluctuations of any unauthorized fund. Clough v. Bond, 3 My. & Cr. 496.

for the estate may perhaps be sufficient exoneration. Nor can it be said that there is any fixed period at which loss by depreciation becomes chargeable absolutely to the representative himself; for it depends on the particular nature of the property, and the particular circumstances.¹ In England, where the range of trust investments is seen to be quite limited, a different application of the rule may be expected than in many parts of the United States. But consistently even with the English rule, leasehold property, or money invested upon good real estate mortgage security, need not be converted into three per cent. consols. Nor, in general, is it the duty of an executor or administrator to call in assets well and productively invested, where no undue risk is apparent, and the cash assets, together with collections, the proceeds of less desirable investments, will suffice for all the immediate purposes of administration.² It is the less secure investments and debts which demand one's keener vigilance.

§ 329. Rule as to making Unauthorized Loans or Investments.

—According to the strict rule of common law, if an executor or administrator lent assets without authority, this was conversion for which he became personally liable.³ This is perhaps too harsh a statement to suit the modern practice, for by the probate and equity precedents it is enough if he act with honesty and due discretion as concerns what may be called authorized classes of loans. But where one loans or invests money belonging to the estate in a mode adverse to the directions of the law, even though honestly intending to benefit the estate, he becomes personally liable for loss should the security prove defective.⁴ He is certainly liable

¹ *Buxton v. Buxton*, 1 M. & Cr. 80; Fla. 112; *Legarde, Succession of*, 20 La. Ann. 148. And so in England.

² *Wms. Exrs.* 1817; 7 Ves. 150; *Wms. Exrs.* 1809; *Bacon v. Clark*, 3 M. & Cr. 294. Or where one loans on a second-class mortgage, and beyond

³ *Tomkies v. Reynolds*, 17 Ala. 109; *State v. Johnson*, 7 Blackf. 529. two-thirds of the value of the mortgaged premises. *Bogart v. Van Velsor*, 4

⁴ As, e.g., in States where loans on the personal security of individuals are not permitted. *Moore v. Hamilton*, 4

if he mixes the trust fund with his own property in such a way that its trust identity is lost ;¹ or if he appropriates the assets to his own use, or, as one might say, loans it to himself, or invests it in his own property, or deposits it as his private fund,² for this would involve a breach of faith. Even where he invests in duly authorized securities, carelessness or bad faith evinced in the conduct of the transaction will still render him chargeable.³

§ 330. **Representative's Acts are for Benefit of those interested in Estate; Good Faith, etc., required.** — Good faith, as in bailments and trusts, continues an element throughout, in the personal representative's dealings with the assets. All the acts of an executor or administrator are by intendment for the benefit of the estate ; and he shall make no personal gain or loss, except as the compensation allowable on his accounts, for the reward of diligence, fidelity, and good management, may be thereby affected.⁴ Nor will he be allowed to speculate with the funds for his own profit or at the risk of the estate.⁵ Nor to acquire interests in or bargain for benefits from the property he controls ; nor in general to take for his own benefit a position in which his interests must conflict with his duty.⁶ Nevertheless, in various modern instances, a purchase of fiduciary assets and interests, by the representative, is upheld as not absolutely illegal and void, though justifying a close scrutiny into the *bond fides* of the transaction.⁷

¹ See *Kirkman v. Benham*, 28 Ala. 501; *Henderson v. Henderson*, 58 Ala. 582.

² *Ackerman v. Emott*, 4 Barb. 626; *Commonwealth v. McAlister*, 28 Penn. St. 480; 53 Ala. 169; 75 Va. 792.

³ *Cason v. Cason*, 31 Miss. 578. And if a real estate mortgage investment should be made without having reasonable assurance that the title is good. *Bogart v. Van Velsor*, 4 Edw. Ch. 718.

⁴ See *post* as to accounts; *Wms. Exrs.* 1842, 1967, and notes; *Cook v. Collingbridge*, Jacob. 607; *Paff v. Kinney*, 1 Bradf. 1.

Where the executor of a chattel mortgagee bought in the equity of redemption in his own name, and for his own benefit, he was held to be a trustee for the benefit of the testator's estate. *Fosbrook v. Balguy*, 1 My. & K. 226.

⁵ *Callaghan v. Hill*, 1 S. & R. 241; *Kellar v. Beelor*, 5 T. B. Mon. 573; *post* as to accounts.

⁶ *Sheldon v. Rice*, 30 Mich. 296; next chapter.

⁷ *Cf. Moses v. Moses*, 50 Ga. 9; next chapter.

Moreover, the fiduciary character of the executor or administrator extends to all the parties interested with respect to their several rights and priorities. He cannot defraud creditors for the sake of those entitled to the surplus; nor sacrifice one legatee for the benefit of the others.

§ 331. **Assets should be kept distinct from Representative's own Property.** — Courts of equity require executors and administrators to preserve the property of the deceased distinct from their own, in order that it may be known and readily traced; and if they do this, the courts will protect and assist them to the extent of their power.¹ Property kept thus distinct cannot be subjected to claims upon the representative in his private capacity.² But where, on the other hand, the executor or administrator commingles funds of the estate with his own, so that the separate identity of the trust fund cannot be traced, he is held accountable, at the option of the beneficiaries, as though for a conversion,³ and interest is sometimes compounded on the fund by way of a penalty or in lieu of the estimated profits.⁴

§ 332. **Liability qualified when Acts are performed under Advice and Assent of the Parties in Interest.** — We may presume that the personal representative can never be strictly justified in deviating from the line of bailment or fiduciary duty. But, in case of doubt as to his proper course, he may protect himself by prudently pursuing in advance one of two courses: (1) he may procure the advice and assent of all the parties in interest; or (2) he may take the direction of the court. On the first point it is laid down in a recent case, that the personal representative who in a particular transaction acts in good faith, under the direction of all the parties who are interested in the estate, is to be protected, when he renders his accounts, from a claim on their part that he has not ad-

¹ Hagthorp v. Hook, 1 Gill & J. 270. And see Calvert v. Marlow, 6 Ala. 337; Robinett's Appeal, 36 Penn. St. 174; Newton v. Poole, 12 Leigh, 112.

² Branch Bank v. Wade, 13 Ala. 427.

³ Henderson v. Henderson, 58 Ala. 582. But see Kirby v. State, 51 Md. 383; 51 Md. 352.

⁴ Gilbert's Appeal, 78 Penn. St. 266; Nettles v. McCown, 5 S. C. 43; McKenzie v. Anderson, 2 Woods, 357.

ministered strictly according to law, in respect to such transaction. He may prosecute or defend suits, compromise claims upon the estate, or deal with the estate in a particular way, not usual or strictly legal, as by continuing the property in business; and those parties in interest, by whose request or assent it has been done, will not be permitted to impute it as maladministration.¹

§ 333. **Liability qualified where Acts are performed under Direction of the Court.** — The personal representative may take the direction of the court. Enabling acts of this character, to be found in our codes, permit the executor or administrator to consult the probate or county court in many instances, and take its direction after an inexpensive and summary course, notwithstanding he might have acted without its direction. Thus, he may ask permission to make a certain sale or pledge of personal property, to invest after a certain manner, to change an investment, to compromise or submit to arbitration a specified claim, or to perform some contract of his decedent. But in most, if not all of such cases, as is shown elsewhere, the executor or administrator may perform without an order of court upon the usual risks of a fiduciary, and the statute is not imperative in requiring him to seek judicial direction in advance.²

Courts of probate are in various States empowered to authorize the money belonging to an estate in process of settlement, or balances or special funds which require to be set aside unusually long, to be deposited in certain designated banks or institutions; or to be temporarily invested in approved securities.³

§ 334. **Rule where Control is taken by Court out of Representative's Hands.** — In this latter connection we may add, that where the control of assets is taken out of the power of the

¹ See Colt, J., in *Poole v. Munday*, 103 Mass. 174, where property was thus continued in business. In *Perry v. Wooten*, 5 Humph. 524, indulgence of a debtor was sanctioned by the parties interested. And see *post* as to accounting.

² *Smith v. Wilmington Coal Co.*, 83 Ill. 498; *Richardson v. Knight*, 69 Me. 285.

³ Mass. Pub. Stats. c. 156, § 32.

personal representative, by the act of the law, orders of the court of probate or chancery, or other paramount authority, his strict fiduciary relation towards it so far ceases, together with his personal liability for its care and management.¹ The English chancery court, after a decree to account, does not permit an executor or administrator to invest without its leave and under its order.² And, in some of the United States, similar safeguards are to be found for various instances; the probate court making orders as to loans and investments, to the intent that no exercise of his own private judgment shall relieve the representative from individual liability.³ Even while pursuing the orders of a court, the representative may incur a personal liability if he disregard the judicial directions.⁴ But paying over the funds to the judge of probate, on the latter's order, the personal representative becomes discharged from all further liability, under such statutes.⁵

§ 335. **Directions of a Will as to Investment, etc., may be reasonably followed; Specific Legacy, etc.**—Directions of the testator's will as to the deposit or investment of particular funds are not to be disregarded.⁶ Thus, even the cautious rules of English chancery justify an executor in laying out a fund in real or personal securities at discretion, or loaning to private individuals, wherever the testator so directed, provided a fair, honest, and prudent judgment be exercised in doing so.⁷ Oral instructions of the decedent, however, cannot justify a diversion of trust funds.⁸ And even as to wills, the doctrine applies not without restrictions. For not only

¹ Hall's Appeal, 40 Penn. St. 409.

² Wms. Exrs. 1809; 2 Meriv. 494.

³ Bacon v. Howard, 20 Md. 191; Lockhart v. Public Administrator, 4 Bradf. 21; Fowle v. Thompson, 5 Rich. Eq. 491; Doogan v. Elliott, 43 Iowa, 342.

⁴ See next c. as to sales under judicial direction; McDonald, Re, 4 Redf. 321. But in sudden and great emergencies, the representative's prudent disregard of such requirements will be leniently treated. Morton v. Smith, 1 Desau. 128.

⁵ Even though the judge's order be verbally expressed. Doogan v. Elliott, 43 Iowa, 342.

⁶ Wms. Exrs. 1809; Forbes v. Ross, 2 Cox. 116; Gilbert v. Welsh, 75 Ind. 557; Smyth v. Burns, 25 Miss. 422; Hogan v. De Peyster, 20 Barb. 100; McCall v. Peachy, 3 Munf. 288.

⁷ Wms. Exrs. 1809. And see Nelson v. Hall, 5 Jones Eq. 32; Smyth v. Burns, 25 Miss. 422.

⁸ Malone v. Kelley, 54 Ala. 532.

may an executor incur liability by persistently carrying out testamentary directions of this sort, plainly inapplicable to existing circumstances, — as if, for instance, the will directed an investment in the stock of a particular corporation, which had since become embarrassed ;¹ but it is fairly established at length in the courts, notwithstanding some hostile criticism, that a testator's directions as to investment apply with the truer force against legatees, their interest being founded in his gift, and not as against creditors, whose just demands must be met irrespective of a testator's intentions.² And hence, a creditor may not be concluded by losses incurred through a fiduciary's loan or investment, such as the will sanctions, but not the rule of the courts and legislature, while a legatee would be concluded.³

A will may, however, control the direction of the executor or administrator in other ways ; as by requiring him to invest, where otherwise the fund might have been left idle ; or to place money in securities to which he would otherwise not have been confined.⁴ To invest less securely than a testator directs, renders the representative liable personally.⁵

A specific legacy should usually remain invested in the specific security or *chose* set apart and designated for that purpose by the will.⁶

¹ If the testator's directions cannot be followed because no such securities as he directs are offered, the representative may prudently deposit on interest in a savings bank. *Lansing v. Lansing*, 45 Barb. 182. Reasonable delay in following the order of the will as to investment, conversion, etc., is excused. *Stretch v. McCampbell*, 1 Tenn. Ch. 41.

² *Wms. Exrs.* 1809, 1836; *Churchill v. Hobson*, 1 P. Wms. 242; *Doyle v. Blake*, 2 Sch. & Lef. 239; *Lewin Trusts*, 5th Eng. ed. 222; *McNair's Appeal*, 4 Rawle, 148. Cf. upon this distinction between legatees and creditors, 1 Eden, 148; *Sadler v. Hobbs*, 2 Bro. C. C. 117.

³ *Doyle v. Blake*, *supra*; *McNair's Appeal*, 4 Rawle, 148.

⁴ *Shepherd v. Moulds*, 4 Hare, 503.

⁵ *Nyce's Estate*, 5 W. & S. 254; *McKenzie v. Anderson*, 2 Woods, 357.

⁶ See this rule stated with its limitations in *Ward v. Kitchen*, 30 N. J. Eq. 31. Also the construction of a direction to invest "in productive funds upon good securities," etc. *Ib.*

Power under a will to change investments, etc., may control other clauses directing a particular investment, under appropriate circumstances. See *Stephens v. Milnor*, 24 N. J. Eq. 358; *Pleasant's Appeal*, 77 Penn. St. 356. Where executors are directed by the will to loan, etc., on interest for a stipulated time, they may presumably, at discretion, loan for less than the full time, and re-loan from time to time, or change the security, as they may deem prudent. *Miller v. Proctor*, 20 Ohio St. 442. In

§ 336. **Summary of Doctrine as to Management and Investment; Deviations, when permitted.**—The general management and investment of the assets is seen to be affected by statute, judicial, or perhaps testamentary directions, whose tendency is to restrain the executor or administrator to a particular course of action. Thus the general bailment doctrine of prudent discretion and good faith becomes affected by requirements that the investment shall be made in specified classes of securities, or that the moneys collected shall be placed with certain depositaries. For such cases the rule is fairly stated thus by Lord Cottenham: "Although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it; yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorized, or be put within the control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive."¹ This is a principle not unfamiliar to the law of bailments, which holds a bailee strictly liable who deviates from the terms of his bailment.²

Yet a deviation from the strict terms of a bailment by reason of necessity is admitted to excuse a bailee,—perhaps because every rule finds its exception; and as Lord Cottenham further observes, necessity, which includes the regular course of business in administering the property, will in equity exonerate the personal representative.³

executing the trust, there must be no negligent or dishonest performance of the directions contained in the will. *Styles v. Guy*, 1 Mac. & G. 422; *Wms. Exrs.* 1806; *Bacon v. Clark*, 3 My. & Cr. 294.

¹ *Clough v. Bond*, 3 M. & Cr. 496.

² See Schoul. Bailm. 109, 135.

³ *Clough v. Bond*, *supra*; *Wms. Exrs.* 1820. And see *Morton v. Smith*, 1 Desau. 128.

§ 337. **Management, Investment, etc., by Executor or Administrator similar to that by Guardian, Trustee, etc.** — The principles discussed in this chapter bear a close analogy to those which the courts apply to guardians and testamentary trustees,¹ as well as to what the law usually denominates bailees;² with, however, essential differences in the character of the office already pointed out.

§ 338. **Election to charge Representative or to accept the Investment.** — Where the executor, or administrator, or other fiduciary, loans the trust money without authority of law, or makes other unauthorized use of it, the rule is that the *cestui que trust*, or beneficiary, may elect either to charge him with the fund thus used, or, instead, to accept the investment.³ When the executor or administrator is charged with and accounts for the fund so used, it becomes his individual property, and he acquires the full rights of a beneficial owner.⁴ A similar right of election avails, where the fiduciary was bound to invest in a certain manner, and did not, so as to charge him with the amount which might have been realized had the specific investment been properly made.⁵

¹ See *e.g.*, Hill Trustees, 368-384, and Wharton's notes; Perry Trusts, §§ 452-464; Schoul. Dom. Rel. §§ 352-354.

² *Supra*, § 315.

³ Clough v. Bond, 3 My. & Cr. 496; Waring v. Lewis, 53 Ala. 615.

⁴ Waring v. Lewis, 53 Ala. 615.

⁵ Wms. Exrs. 1815; Shepherd v. Moul, 4 Hare, 503; Darling v. Hammer, 5 C. E. Green, 220. But *aliter*, it appears, if no fund was specified; for such a rule becomes impracticable. 1 De G. M. & G. 247; Wms. Exrs. 1815.

CHAPTER IV.

THE REPRESENTATIVE'S POWER TO SELL, TRANSFER, AND PURCHASE.

§ 339. **Representative's Power to dispose of Assets.**—For the sake of an efficient administration of the estate which he represents, the absolute control of the personal property of the decedent, for purposes of his trust, is vested by law in the executor or administrator, and he has the legal power to dispose of any and all of such property at discretion. This rule, as we have seen, prevails where no statute opposes restraints; and while it is the representative's duty to use reasonable diligence in converting assets into cash, for the general purposes of his trust, the law permits him, within certain limits, to exercise a reasonable discretion as to the time when he shall make a transfer of assets, and the manner in which his right of disposition shall be exercised.¹ Sound judgment and honesty on the representative's part may be presumed by the buyer in such a case; and provided he purchase *bond fide* for a fair consideration, and without fraudulent collusion, his title to personal assets of the decedent, derived through the lawful executor or administrator, must prevail against the world.²

§ 340. **Sale or Transfer can only be made while the Representative holds Office.**—A sale or transfer made by an executor or administrator while in office is not rendered the less valid as respects third parties by the later revocation of his author-

¹ *Supra*, § 322; Wms. Exrs. 932; Nugent v. Giffard, 1 Atk. 463; Whale v. Booth, 4 T. R. 625.

² The principle is, that the executor or administrator in many instances must sell in order to perform his duty in paying debts, etc.; and no one would deal

with an executor or administrator if liable afterwards to be called to account. Whale v. Booth, 4 T. R. 625, *per* Lord Mansfield. And see Wms. Exrs. 934, 935; Scott v. Tyler, 2 Dick. 725; Leitch v. Wells, 48 N. Y. 585.

ity, or his resignation or removal; and as for its justification in the settlement of his accounts, the cardinal rule of good faith and due prudence still applies.¹ But a sale, made after the title which devolved upon him at the death of his testator or intestate, has become divested by his removal or otherwise, cannot be good, for he has not a title to confer.²

§ 341. **Whether Assets should be sold at Public or Private Sale.** — The general rule is that the representative's sale of his decedent's personal property may be either at private or public sale, provided the sale be reasonably prudent and honest.³ But an auction or public sale best vindicates the representative's good conduct, where the amount actually realized falls short of the appraised value, and, on the whole, is the safer; and in some States, indeed, the representative must, unless protected by judicial directions, sell at public sale, or no title will pass to the purchaser.⁴ Where the representative sells fairly at public sale, he is only responsible for what the property brought; where he sells at private sale, the full value appears the test, rather than the price obtained; but in either case, if the sale be fair and honest, the purchaser, according to the usual rule, takes a good title.⁵ The representative may appoint an agent or auctioneer to sell for him.⁶

§ 342. **Sale of Goods bequeathed for Life with Remainder over.** — A residue of goods which are given for life with a remainder over, ought to be sold by the executor, if the trust is confided to him; and the interest or money on the invested proceeds of the sale should be paid to the legatee for life, the principal being kept for the remainder man.⁷

¹ *Benson v. Rice*, 2 Nott. & M. 577; *Second Nat. Bank*, 57 Ind. 198. See *Price v. Nesbit*, 1 Hill (S. C.) Ch. 445. *Butler v. Butler*, 10 R. I. 501. And see *Soye v. McCallister*, 18 Tex. 80. ⁵ *Lothrop v. Wightman*, 41 Penn. St. 297, 302.

² *Whorton v. Moragne*, 62 Ala. 201. ⁶ *Lewis v. Reed*, 11 Ind. 239; *Dickson, Re*, 6 La. Ann. 754. ³ *Mead v. Byington*, 10 Vt. 116; *Tyrrell v. Morris*, 1 Dev. & B. Eq. 559.

⁴ *Bogan v. Camp*, 30 Ala. 276; *McArthur v. Carrie*, 32 Ala. 75; *Gaines v. De la Croix*, 6 Wall. 719; *Weyer v.* ⁷ *Jones v. Simmons*, 7 Ired. Eq. 178. See *Sarle v. Court of Probate*, 7 R. I. 270.

§ 343. **Power of Representative to dispose of Chattels specifically bequeathed.** — The power of the executor to transfer and dispose of a chattel specifically bequeathed, though sometimes questioned, appears on the whole to be well established, as following the general rule of personal assets.¹ But cautious administration appears to require, in order to clear the representative himself and a purchaser who happens to be aware of such bequest, that the specific legatee should concur in the transfer;² for, undoubtedly, the executor's assent to the legacy, so as to divest his title in favor of a specific legatee, is readily presumed wherever the estate is ample to meet demands upon it; and unless the general personal assets fail, the executor commits a breach of duty in disposing of property bequeathed specifically.³

§ 344. **Sales of Perishable Assets, etc.** — Sales of personal property of a decedent's estate, when liable to waste, or when of a perishable nature, may be expressly authorized by the court, as some statutes provide; such provisions, however, having a fitter relation to special administrators, collectors, and the like, than to the general administrator or executor, whose discretion to sell for the preservation and benefit of the estate cannot be doubted.⁴

§ 345. **Representative's Sale of his Decedent's Business.** — An executor or administrator has authority to dispose of the business of his decedent, including the stock in trade and good will; he may also sell out the stock on hand separately, in the exercise of a reasonable discretion; but he should be heedful how he incurs personal risks by undertaking, without authority, to carry on the trade himself.⁵ So, too, the repre-

¹ 2 Vern. 444; *Ewer v. Corbet*, 2 P. Wms. 149; *Langley v. Lord Oxford*, Ambl. 17; Wms. Exrs. 934.

² Wms. Exrs. 934, and note, citing 2 Sugd. Vendors, 56, 9th ed.

³ See *post* as to legacies. One who purchases a chattel specifically bequeathed, knowing that it was thus be-

queathed, and that there are no debts, will take his title subject to the bequest. *Garnett v. Macon*, 6 Call. 308.

⁴ *Public Administrator v. Burdell*, 4 Bradf. 252; Redf. (N. Y.) Surr. Pract. 175; *Harris v. Parker*, 41 Ala. 604. And see *supra*, § 327.

⁵ *Supra*, § 325.

sentative of a deceased partner may dispose absolutely of his decedent's interest in the assets of a firm to the surviving partner, or to any other person under the same qualifications; and he may accept cash or other personal property in payment, if the bargain be a fair one.¹ Circumstances may arise under which the representative's sale, made to the surviving partner simply in order to transfer to him the legal title to be used for settling the business, may prove valueless to the estate; as where the whole firm property is needed to satisfy the firm debts.²

A personal representative who trades actively with his decedent's stock, renders himself a trader, on the one hand, to those with whom he deals, while, on the other, he continues accountable to the estate for the value of the stock thus perverted, and its profits.³ But merely to sell out the stock in hand, without increasing what the decedent left, does not constitute the representative a trader; for it is a question of intention to carry on the trade, which must be inferred from circumstances.⁴ Where an executor, in carrying on a trade under a power contained in the will, abuses his authority, by taking out a new lease of the premises in his own name, and then borrows money on the security of the lease, the equity of the testator's estate to the renewed lease will take precedence of the lender's equity to such security.⁵

§ 346. **Sales and Transfers of Personal Assets under Probate Direction.**—Local legislation in the United States aids, sometimes, the representative's inherent power over the personal assets. Thus, a Massachusetts statute provides that a probate court, after the return of the inventory, may order a part or the whole of the personal estate of the

¹ Roy v. Vilas, 18 Wis. 169. And see as to carrying on a partnership trade, *supra*, § 326.

² Merritt v. Dickey, 38 Mich. 41.

³ See *supra*, § 326; Wood's Estate, 1 Ashm. 314; Leeds Banking Co., *Re*, L. R. 1 Ch. 231.

⁴ Wms. Exrs. 1794.

⁵ Pillgrem v. Pillgrem, 45 L. T. 183. For the equity of the estate attached the

moment the new lease was granted, and the lender's equity not until the loan was made; and of two parties with equal equities, *qui prior est tempore, potior est jure*. Nor can it in such a case be said that the lender was a purchaser without notice, for had he inquired he would have been placed on his guard.

deceased to be sold by public auction or private sale as may be deemed most for the interest of all concerned; application for such an order may be made by the representative or by any person interested in the estate; and the representative shall account for the property so sold at the price at which it sells.¹ This act does not restrain executors and administrators in their general authority to alienate the personal assets, except, perhaps, in affording interested parties an opportunity to apply for an order directing the manner of sale; but its main object appears rather to protect the representative, where delicate management is needful for settling the estate properly. So, too, the New York statute provides for a formal sale, public or private, of personal property so far as may be needful, under judicial direction, if the executor discovers that debts and legacies cannot otherwise be paid and satisfied.² Statutes of a similar character may be found in other States;³ the

¹ Mass. Pub. Stats. (1882) c. 133, § 3.

² 2 N. Y. Rev. Stats. 87, § 25; Redfield's (N. Y.) Surrogate Pract. 236.

³ Gary's Prob. Pract. § 334; Wisc. Stats. § 3837; Gen. Stat. Minn. c. 54, § 4. See also Joslin v. Caughlin, 26 Miss. 134. In some States a sale of stocks cannot be made without license of the probate court unless the representative assumes the whole inventory of the estate at its appraised value. French v. Currier, 47 N. H. 88. Or it is held that the representative must not sell without order of court for less than the appraised value of the property. Munteith v. Rahn, 14 Wis. 210.

The power of the probate court to order a sale of personal property is conferred by a statute, and *quoad hoc*, the probate court is a tribunal of special jurisdiction, and must pursue the statute requisites. Hall v. Chapman, 35 Ala. 553. Sale cannot be ordered at the instance of a personal representative, unless the title which devolved upon such representative remains in him. Whorton v. Moragne, 62 Ala. 201. As to the

object of such sale, as set forth by petition, see Ikelheimer v. Chapman, 32 Ala. 676.

The executor or administrator need not wait for a judgment to be had against him for a debt justly due, in order to make valid the title of a purchaser of property sold in satisfaction of the debt. Smith v. Pollard, 4 B. Mon. 67.

Peculiar delays attending the settlement of the estate such as might arise, for instance, where the rights of those claiming to be legatees or distributees were in litigation, might justify the probate court in ordering a sale of personal property on the representative's application. Crawford v. Blackburn, 19 Md. 40. As to notice of the intended sale, see Halleck v. Moss, 17 Cal. 339; Butler v. Butler, 10 R. I. 501. As to postponement of the sale, see Lamb v. Lamb, Spears (S. C.) Ch. 289.

The purchaser should see that the representative makes his sale according to the statute or judicial order. Fambro v. Gautt, 12 Ala. 305. Mere irregularities in pursuing an order of sale are sometimes cured by the court's con-

general right of the representative to alienate personal assets not being essentially altered thereby.

The Massachusetts statute provides further that, for the purpose of closing the settlement of the estate, a probate court may, upon petition of the executor or administrator, and notice to the interested parties, license a sale and assignment of any outstanding debts and claims which cannot be collected without inconvenient delay;¹ and any suit for the recovery of a debt or claim thus sold and assigned shall be brought in the name of the purchaser, and the executor or administrator shall not be liable for costs.²

Personal property of the deceased, notwithstanding such statutes, is commonly sold by executors or administrators, at their own discretion, without any order of court; and, if the representative acts in good faith and sound discretion, the interests of no person concerned can be injuriously affected.³ The subsequent approval of the court, moreover, appears practically equivalent to a previous order. The executor or administrator, however, makes a sale at his own risk, where such an order is not previously obtained; and the advantage of procuring it is apparent, where it is probable that the property cannot be sold for its appraised value and the administration may be greatly affected by the amount realized; for, complying with the terms of his order, the executor's or administrator's responsibility is limited to duly accounting for the proceeds of the sale.⁴

firmation of the sale. *Jacob's Appeal*, 23 Penn. St. 477. Some statute formalities may be merely directory and not imperative. *Martin v. McConnell*, 29 Ga. 204. Where the sale was invalid by reason of irregularity, another sale may be made without getting a new order to sell from the probate court. *Robbins v. Wolcott*, 27 Conn. 234. A sale made under a void judicial order, and dependent on a judicial order for its validity, is absolutely void. *Beene v. Collenberger*, 38 Ala. 647; *Michel, Succession of*, 20 La. Ann. 233. See further, *Libby v. Christy*, 1 Redf. (N. Y.) 465.

The purchaser at the representative's sale should on discovery of irregularities elect promptly whether to repudiate the transaction or not, and act consistently with his election. *Joslin v. Caughlin*, 30 Miss. 502.

¹ Mass. Pub. Stats. c. 133, § 4. A similar authority is exercised by the probate court in Louisiana practice. *Pool, Succession of*, 14 La. Ann. 677.

² Mass. Pub. Stats. c. 133, § 5.

³ *Hearth v. Heddlestone*, 2 Bay (S. C.) 321; *Mead v. Byington*, 10 Vt. 116; *Sherman v. Willett*, 42 N. Y. 146; *Smith (Mass.) Prob. Pract.* 110.

⁴ *Smith Prob. Pract.* 110; *Redf. (N.*

The *bond fide* purchaser at a sale ordered by the probate court acquires a good title, unless chargeable with notice that the order was improperly procured, by misrepresentation to the court or otherwise; consequently the transfer of his own title will be good.¹

§ 347. **Authority to sell or transfer as affected by Expressions in the Will.** — An executor's authority to sell and transfer personal property may be confirmed or enlarged by a power of sale clause contained in his testator's will;² such clauses relating usually, however, in expression, to the testator's real estate or to his property generally; and so, doubtless, directions contained in a will may qualify or restrain the executor's general power to transfer the assets.³ Upon a testator's general direction to sell and distribute, the executor is the proper person to sell, unless some one else is pointed out by the will.⁴ Where a testator shows by his will that he intends to intrust his personal representative with the power of disposal, and of receiving and applying the proceeds, the purchaser or the transferee, for security, is not bound to see to the application of the money raised.⁵ A power of sale, out and out, and having an object beyond the raising of a particular charge, does not, however, authorize a transfer by way of pledge or mortgage.⁶ Powers under a will should be construed according to their true intendment. But, while English equity courts appear sometimes to have created artificial distinctions to the hazard of the transferee, in respect of the application of proceeds,

Y.) Surr. Pract. 237; Williams v. Ely, 13 Wis. 1; Munteith v. Rahn, 14 Wis. 210.

¹ Pulliam v. Byrd, 2 Strobb. Eq. 134; Knight v. Yarborough, 4 Rand. 566. The sale by an executor or administrator under a judicial order carries the legal title, and will be presumed to have been in good faith, unless the contrary is shown. Price v. Nesbit, 1 Hill (S. C.) Ch. 445.

² Smyth v. Taylor, 21 Ill. 296; Dugan

v. Hollis, 11 Md. 41; Durham, Estate of, 49 Cal. 491.

³ Evans v. Evans, 1 Desau. 515. Whether the executor may not sell or pledge personal assets for the payment of debts notwithstanding the will has provided a particular fund, see Tyrrell v. Morris, 1 Dev. & B. Eq. 559.

⁴ McCollum v. McCollum, 33 Ala. 711.

⁵ Stronghill v. Anstey, 1 De G. M. & G. 635.

⁶ Ib.

the general doctrine favored in this country is, that a purchaser or transferee who, in good faith, pays or advances to the person authorized by the will to transfer, need not look to the application of the proceeds of the transaction by that person.¹

§ 348. **Consulting Parties in Interest, as to the Time, Manner, etc., of Sale.** — The judgment of residuary legatees or distributees may be of importance in aiding the representative's discretion as to the time, place, and manner of sale. He is not bound to act upon the judgment of one or all of such parties; but to ascertain and act upon the wishes of the majority of beneficiaries in interest may often be convenient where the fiduciary's own responsibility is a delicate one.²

§ 349. **Representative may pledge or mortgage Assets instead of selling.** — The general right of disposition and transfer involves the right to transfer in bailment as well as by sale. If an executor or administrator may advance funds of his own to pay the debts of the estate, so might it be judicious to raise money for discharging the immediate demands of the administration by pledging or mortgaging assets, and avert the necessity of immediate sale of chattels at a sacrifice, or anticipate the receipt of income or other assets likely to be realized later. In fact, the great weight of authority, English and American, is to the effect that, unless positively restrained by statute or the particular will, the representative of the deceased may mortgage or pledge the assets, or part of them, as well as alienate; the general presumption being that one does so, as he well might, in the course of a prudent administration.³

¹ *Andrews v. Sparhawk*, 13 Pick. 393; *Cadbury v. Duval*, 10 Penn. St. 265; *Gardner v. Gardner*, 3 Mason, 178, 219, *per* Mr. Justice Story; *Stronghill v. Anstey*, 1 De G. M. & G. 635 (Am. ed.), and note by Perkins.

² See *Marsden v. Kent*, 25 W. R. 522.

³ *Scott v. Tyler*, 2 Dick. 712; *Wms. Exrs.* 934; *Hill v. Simpson*, 7 Ves. 152;

Vane v. Rigdon, L. R. 5 Ch. 663; *McLeod v. Drummond*, 17 Ves. 154; *Shaw v. Spencer*, 100 Mass. 392; *Carter v. Manufacturers' Bank*, 71 Me. 448; *Smith v. Ayer*, 101 U. S. Supr. 320; *Wood's Appeal*, 92 Penn. St. 379; *Goodwin v. American Bank*, 48 Conn. 550. But see *Ford v. Russell*, 1 Freem. (Miss.) Ch. 42.

§ 350. **Bona Fide Purchaser, Pledgee, etc., not bound to see to Application of what he pays or advances.** — As a general principle, it is not incumbent on either a purchaser or a transferee upon security, to see that the money he pays or advances is properly applied, although he knew he was dealing with an executor or administrator; and simply because the executor or administrator may be presumed to exercise properly his large discretion to dispose of personalty belonging to the estate.¹ Hence, the equities of a *bona fide* transferee, without due notice of a fraud upon the estate, are respected; though this does not by intendment enlarge the legal powers of the representative, or give a colorable sanction to misconduct on his part.

Nor with reference to the office of executor or administrator does the same rule of caution apply as in the case of a trustee; the latter takes property rather for custody and management for his *cestuis que trust*, but the former for administration and a sort of dispersion of the assets. Hence, it might be perilous to buy trust funds or loan money on their pledge, where notice of a trust accompanied the transaction, while a sale or pledge of personal assets by the representative would stand because he is presumed to have the right to transfer.²

The more conservative expression of some cases, however, is that the legal representative can dispose of the personal assets of the decedent for all purposes connected with the discharge of his duties under the will; and that even where the transfer upon security is made for other purposes of which the pledgee or mortgagee has no notice or knowledge, but takes the property for the ostensible purpose in good faith, parting with his own accordingly, the transaction will be sustained;³ a statement which certainly is not too strong. For the transferee of personal property from an executor or

¹ *Supra*, § 347; *Hill v. Simpson*, 7 Ves. 152; *Field v. Schieffelin*, 7 Johns. Ch. 150; *Scott v. Taylor*, 2 Dick. 725; *McLeod v. Drummond*, 17 Ves. 154; *Shaw v. Spencer*, 100 Mass. 392; *Jones v. Clark*, 25 Gratt. 642.

² *Duncan v. Jaudon*, 15 Wall. 165; *Shaw v. Spencer*, 100 Mass. 382; *Bayard v. Farmers' Bank*, 52 Penn. St. 232; *Perry Trusts*, § 225.

³ *Smith v. Ayer*, 101 U. S. Supr. 320, 327, *per* Mr. Justice Field.

administrator, whether by way of purchase or security, is not bound to see to the application of the proceeds received from him, but may assume that they will be properly applied.¹

§ 351. **Letters Testamentary or of Administration are Credentials of Authority to transfer, etc.** — Letters of administration or letters testamentary are commonly regarded as sufficient evidence of authority to transfer stock or registered bonds, or assign and collect bank deposits and other incorporeal personalty; because all such transfers, assignments, or collections are within the line of an executor's or administrator's duty.² Not so plainly, however, with a trustee's letters.³

§ 352. **Good Faith and Caution requisite from Purchaser, Pledgee, etc., in dealing with Personal Representative.** — As to sale or transfer upon security, however, limitations are imposed, not upon the legal representative alone, whose mismanagement of his trust may be visited upon him and his bondsmen apart, but likewise upon the purchaser, pledgee, or mortgagee, who has dealt with him, and whose interest consists in having the transaction upheld. As to these third parties the law exacts, on their part, perfect good faith in the transaction, and freedom from all improper collusion for perverting the assets. Wherever, therefore, the purchaser, pledgee, mortgagee, or other transferee, takes assets and accepts their transfer, for what one may reasonably suppose is outside the scope of the representative authority, he is bound to look into that authority or he will act at his peril.⁴ And any person receiving from an executor or administrator the assets of his testator or intestate, knowing that such disposition of them is in violation of his duty, is to be adjudged as conniving with such representative, and is responsible for the property thus received, whether he be one kind of transferee or another; and the

¹ *Smith v. Ayer*, 101 U. S. Supr. 320, 327.

² *Bayard v. Farmers' Bank*, 52 Penn. St. 232.

³ *Duncan v. Jaudon*, and other cases, *supra*.

⁴ *Smith v. Ayer*, 101 U. S. Supr. 327.

assets may be followed and recovered for the benefit of the estate.¹ Notice of the misapplication involves the transferee as a participator in the fraud; and there are numerous authorities to support the doctrine that where one has reasonable grounds for believing that the executor or administrator intends to misapply such assets or their proceeds, or is in the very transaction converting them to private uses, such party can take no advantage from the transaction, and the title he has acquired cannot be upheld.²

¹ Smith v. Ayer, 101 U. S. Supr. 327.

² McLeod v. Drummond, 17 Ves. 153; Collinson v. Lister, 7 De G. M. & G. 633; Hutchins v. State Bank, 12 Met. 423; Mr. Justice Field in Smith v. Ayer, 101 U. S. Supr. 328; Field v. Schieffelin, 7 Johns. Ch. 150, *per* Chancellor Kent; Miller v. Williamson, 5 Md. 219; Yerger v. Jones, 16 How. 30; Lowry v. Commercial Bank, Taney C. C. 310; Graff v. Castleman, 5 Rand. 195.

A sale or pledge, therefore, of assets, which is known to be for the payment or security of the executor's or administrator's own private debt is invalid; for the act speaks for itself to the purchaser or pledgee as a breach of duty. Carter v. Manufacturers' Bank, 71 Me. 448; Scott v. Searles, 15 Miss. 498; Smartt v. Waterhouse, 6 Humph. 158. It appears to have been laid down in some of the earlier cases that the executor's sale of assets in satisfaction of his own private debt is not necessarily invalid, although the purchaser knew that the goods sold were the goods of the testator. Farr v. Newman, 4 T. R. 642. But even in the common-law courts the qualifications asserted were such as almost to neutralize the doctrine. See Wms. Exrs. 937. In equity, however, it has since become clearly established that to make sale of the assets or pledge them as security for the representative's private debt is *per se* notice of misapplication, and involves the purchasing or pledge creditor in the fraud. Wms. Exrs. 937, and Perkins's note. And

such is now the general English and American rule on this subject. *Ib.* And though the representative might give his own note as a voucher for money obtained for a legitimate purpose connected with a *bond fide* administration, and pledge assets to secure it; yet if he gave it for some private debt of his own, created before or during his trust, but independently of it, and due the pledgee, the pledge transaction could not stand. See Virgin, J., in Carter v. Manufacturers' Bank, 71 Me. 448. A sale which allows the purchaser to credit the price in liquidation of the representative's private debt has been considered, if not avoided, as leaving the purchaser still responsible to the estate for the purchase-money. Chandler v. Schoonover, 14 Ind. 324. A purchase of the testator's effects at a nominal price, or at a fraudulent undervalue, in collusion with the representative, renders the purchaser liable for the full value; or, at the option of those interested, the transfer may be set aside. Rice v. Gordon, 11 Beav. 265; Wms. Exrs. 936; Sacia v. Berthoud, 11 Barb. 15. And where parties dealt with an executor, who was obviously exercising his power to dispose of the personal assets to raise money, not immediately for the settlement of the estate, but for the business of a commercial firm, it was lately held that they were bound to look into his authority under the will before purchasing such assets or loaning money on their pledge; and that not having done so, their title failed, the transaction being impeached

§ 353. **Disposal of Chattels Real; assigning and underletting Leases.** — The executor or administrator may, by virtue of his office, and as representative of the deceased entitled to chattels real, assign and dispose absolutely of the leases and terms for years, whose title thus devolves upon him; subject, of course, to the usual restrictions imposed upon his power to alienate.¹ This power to assign or underlet is, however, frequently restrained or excluded in modern times by the original terms of the lease, so that the lessor's consent is

on behalf of the estate as fraudulent. *Smith v. Ayer*, 101 U. S. Supr. 320. And see *Salmon v. Clagett*, 3 Bland, 125; *Le Baron v. Long Island Bank*, 53 How. (N. Y.) Pr. 286.

Where, too, the representative mortgages personal property of the deceased for purposes which the mortgagee, under the circumstances, is notified are a fraud upon the estate, the mortgage may be avoided on behalf of those interested in the estate and aggrieved thereby. *Salmon v. Clagett*, 3 Bland, 125; *Colt v. Lesnier*, 9 Cow. 320; *Wilson v. Doster*, 7 Ired. Eq. 231; *Parker v. Gilliam*, 10 Yerg. 394. In a word, "those who receive trust property from a trustee in breach of his trust become themselves trustees if they have notice of the trust." "This general doctrine," observes Chapman, J., in *Trull v. Trull*, 13 Allen, 407, "has been applied to a great variety of cases."

But where a bank in good faith lent money to an executor upon his individual note, secured by a pledge of stocks belonging to the estate, and upon his statement that the loan was for the purposes of the estate, the pledge was in a recent case held valid, so that the stock could not be recovered without refunding the loan. *Carter v. Manufacturers' Bank*, 71 Me. 448. Knowledge of the representative's fraud in procuring the loan is not to be inferred from his desire to renew and continue the loan for nearly four years. *Goodwin v. American Bank*, 48 Conn. 550. And where an executor pledged stock to his

broker as collateral security for his own debt, and the broker pledged the certificates to a third, who advanced money on them, supposing the broker to be the owner, the transfers showing on their face that the title came from the executor, the pledgee's title was likewise upheld with deference to mercantile usage. *Wood's Appeal*, 92 Penn. St. 379. By commercial usage, the court here observed, a certificate of stock accompanied by an irrevocable power of attorney, either filled up or in blank, is in the hands of a third person presumptive evidence of ownership in the owner; and where the party in whose hands the certificate is found is a holder for value, without notice of any intervening equity, his title cannot be impeached. *Wood's Appeal*, ib., citing authorities. For whatever the pledgor's own breach of trust, or an agent's abuse of authority, one who confers upon another by a written transfer all the *indicia* of ownership of property is estopped to assert title as against a third person, acquiring it *bona fide* for value; and the principle, reluctantly perhaps to be admitted in the settlement of a dead person's estate, applies undoubtedly against a living owner.

Purchaser's title under sale not affected by discovery and probate of a later will. *Davis v. Gaines*, U. S. Supr. (1882).

¹ Bac. Abr. Leases, I. 7; Wms. Exrs. 939; Taylor Landl. & Ten. § 133. See *Drohan v. Drohan*, 1 B. & B. 185; *Keating v. Keating*, 1 Lloyd & G. 133.

made a pre-requisite; in which case it becomes a question of construction whether an express restraint upon alienation or underletting shall take effect against executors or administrators, or be held binding only upon the lessee personally. If the executor or administrators, as well as the lessee, are named in the proviso or covenant, they cannot assign, underlet, or dispose of the term without the lessor's permission; though it appears otherwise, where such representatives are not mentioned in the covenant.¹

The executor or administrator, in whom leaseholds become vested, should ordinarily sell and assign and let the assignee take the risks as to the value of his purchase. In some cases an underlease from the representative himself will be supported, though this is an exceptional mode of dealing with such assets.² But in a recent English case it is held to be *ultra vires*, and a breach of trust for an executor or administrator to grant an underlease of leaseholds of his testator or intestate, with an option of purchase to be exercised by the sub-lessee at some future time at a fixed price.³ The proceeds of an absolute disposition of the lease, or the rents accruing from an underlease, or any other beneficial enjoyment of the premises, become assets of the estate in the personal representative's hands.⁴

§ 354. Restraints upon the Power to dispose of Assets as concerns the Representative himself. — To speak of limitations upon the representative's power to alienate and transfer the personal assets, more particularly as they affect the official responsibility of the representative himself and the liability of the sureties on his bond, the rule is that he must not sell, pledge, or otherwise transfer personal property belonging to

¹ Wms. Exrs. 940-943, and cases cited; *Roe v. Harrison*, 2 T. R. 425; *Lloyd v. Crispe*, 25 Taunt. 259. And see *supra*, § 223.

² Bac. Abr. Leases, I. 7; Wms. Exrs. 939.

³ *Oceanic Steam Nav. Co. v. Sutherland*, 29 W. R. 113.

⁴ Bac. Abr. Leases, I. 7; Wms. Exrs.

939; 2 W. Bl. 692; *Bank v. Dudley*, 2 Pet. 492; *Taylor Landl. & Ten.* § 133.

That an administrator has no power to mortgage leaseholds, under leases not containing repairing covenants, in order to raise money for repairing the property, see *Ricketts v. Lewis*, 20 Ch. D. 745. And see *post* as to dealings with real estate.

the estate, except it be in the exercise of good faith and reasonable prudence,¹ for the benefit of the estate and without perversion of the assets to other purposes. Though wrongful or imprudent transfer may pass a good title to the transferee, it cannot exonerate the representative who has made it from direct responsibility, as, in our practice, an official subject to removal, whose bond may be prosecuted for the benefit of those suffering in interest through his maladministration.² In some States it is laid down that an administrator can sell only to pay debts and make distribution;³ and yet in connection with the investments and reinvestment of funds not needed for immediate disbursement, the discretion of a representative seems rightfully a broader one; and whether he be executor or administrator, the true criterion appears to be rather whether he exercised reasonable prudence and good faith under all the circumstances, in making the transfer.⁴

§ 355. **Representative's Liability for Negligence, Fraud, etc., in the sale of Assets.**—Delays attending the sale of particular assets may not, therefore, be inexcusable, though loss or depreciation in value should result; provided the representative's course appears to have been honorable in intent and not unreasonable.⁵ But the executor or administrator is bound to exercise due and reasonable care and diligence, as well as good faith, in disposing of assets, as to the time, manner, and terms of the sale; more especially where he acts upon his own responsibility, without consulting either the court or the parties in interest.⁶ For the consequences of his own fraud, in connection with a transfer, he is unquestionably answerable, on the usual principles, to the innocent

¹ "Ordinary prudence," according to the American rule; less than this, perhaps, by the English standard. See *supra*, § 315.

² *Overfield v. Bullitt*, 1 Mo. 749.

³ *Baines v. McGee*, 9 Miss. 208.

⁴ *Mead v. Byington*, 10 Vt. 116; *Sherman v. Willett*, 42 N. Y. 146; 13 Allen, 407.

⁵ *Dugan v. Hollins*, 11 Md. 41; *McRae v. McRae*, 3 Bradf. 199; *Mead v. Byington*, 10 Vt. 116; *Stewart v. Stewart*, 31 Ala. 207; *supra*, § 315.

⁶ *Griswold v. Chandler*, 5 N. H. 492; *Orcutt v. Orms*, 3 Paige, 459. See *supra*, § 315, as to whether the standard is "ordinary" or "slight" care and diligence.

parties injured thereby.¹ The time and method chosen by the representative for making a sale and disposing of assets should be reasonable under all the circumstances.² And if he act under judicial directions, he must comply with them.³ Where the property is of a fluctuating and uncertain character, like speculating stocks and securities which might rise or fall, postponing their disposition to the period when it becomes strictly necessary to realize such assets in order to settle the estate, is not to be imputed as culpable default, provided that under the circumstances reasonable prudence and good faith were displayed.⁴

If the representative fails in his duty in these or other respects, he may be held to account for the property on the basis of the inventory value, or perhaps the actual loss to the estate;⁵ but if he does his whole duty with fidelity and reasonable care, he cannot be charged with a loss or depreciation of the assets. A failure to sell and dispose of personal assets does not necessarily impute carelessness to the executor or administrator, but the circumstances should be considered.⁶

§ 356. **The same Subject; Obtaining Payment or taking Security for the Purchase-Money.** — As to carelessness or bad faith in procuring payment or taking or enforcing security for the purchase-money, the same doctrine applies. Thus, where the representative sells personal property by order of court, with credit to be given on specified security for the purchase-money, but allows the purchaser to carry away the property without giving such security, and the security cannot afterwards be obtained, this is culpable negligence on his part,

¹ *Skrine v. Simmons*, 11 Ga. 401; *Heath v. Allin*, 1 A. K. Marsh. 442; *Harrington v. Brown*, 5 Pick. 519; *Miles v. Wheeler*, 43 Ill. 123; *Woods v. North*, 6 Humph. 309.

² *Griswold v. Chandler*, 5 N. H. 492; *Marsden v. Kent*, 25 W. R. 522.

³ *McDonald, Re*, 4 Redf. 321.

⁴ *Marsden v. Kent*, 25 W. R. 522.

⁵ *Griswold v. Chandler*, 5 N. H. 492; *Pinckard v. Woods*, 8 Gratt. 140.

⁶ *McRae v. McRae*, 3 Bradf. 199. Shipping goods in good faith, to be sold abroad instead of in the home market, does not necessarily charge the representative with the loss ensuing, his course not being imprudent in itself, though resulting unfortunately. *Bryan v. Muligan*, 2 Hill (S. C.) Ch. 261.

and he must answer to the estate for the loss.¹ For, in making a sale under judicial directions, he cannot safely disregard the terms prescribed. Indeed, a sale of assets made on credit, and without taking security of any sort from the purchaser, can rarely be considered a prudent transaction on the part of a fiduciary, so as to exempt him from the risk of subsequent loss.² And in pursuing the security taken, or attempting to recover property transferred, one may be culpably negligent, or the reverse.³ Security taken in connection with a transfer of the assets, by the representative, enures properly to the benefit of the estate.⁴

On the other hand, where the representative takes security or a note for the purchase-money, and a loss occurs not attributable to his fault, he is only chargeable with the amount actually collected and realized.⁵ If a sale be made on credit, it is not improper to receive the money before the expiration of the credit.⁶

§ 357. **Collusive or Fraudulent Disposition of Assets by the Representative.**—Where an executor or administrator collusively sells personal property of his decedent at an under-value, when he might have obtained a higher price, or so as to lose the price altogether, it is a *devastavit*, and he shall answer for the real value.⁷ Or if, from improper motives, he procures an advantageous sale to be set aside for technical reasons against the purchaser's will, and procures resale at a loss, he must make good the loss.⁸ And, notwithstanding

¹ Hasbrouck *v.* Hasbrouck, 27 N. Y. 182; Vreeland *v.* Vreeland, 13 N. J. L. 512; Massey *v.* Cureton, 1 Cheves, 181; Betts *v.* Blackwell, 2 Stew. & P. 373; Davis *v.* Marcum, 4 Jones Eq. 189; Peay *v.* Fleming, 2 Hill Ch. 97; Southall *v.* Taylor, 14 Gratt. 269. But incidental delays or omissions in connection with security are not necessarily culpable. Gwynn *v.* Dorsey, 4 Gill & J. 453.

On failure of compliance with the terms of sale, the representative may sue the purchaser at once. Peebles *v.* Overton, 2 Murph. 384.

² Orcutt *v.* Orms, 3 Paige, 459; Stukes *v.* Collins, 4 Desau. 207; Chandler *v.* Schoonover, 14 Ind. 324; Dilla-
baugh's Estate, 4 Watts, 177.

³ Johnston's Estate, 9 W. & S. 107.

⁴ See Pulliam *v.* Winston, 5 Leigh, 324; Napier *v.* Wightman, Spears, Ch. 357.

⁵ Stewart *v.* Stewart, 31 Ala. 207.

⁶ Gwynn *v.* Dorsey, 4 Gill & J. 453. See 57 Cal. 407.

⁷ Skrine *v.* Simmons, 11 Ga. 401; Heath *v.* Allin, 1 A. K. Marsh. 442.

⁸ Mountcastle *v.* Mills, 11 Heisk. 267.

the form of a judicial or a public sale was pursued, this will not debar a court of equity from examining into the whole transaction, and considering whether there was a collusive sale to defraud the estate of a just price.¹

Where there is any collusive and fraudulent dealing with the personal assets of an estate, or a misappropriation, not only a creditor, but a legatee, whether general or specific, or a distributee, is entitled to follow the assets in equity.² But all such rights must be enforced within a reasonable time, considering the opportunity afforded for ascertaining the true character of the transaction, or else the right will be barred by their presumed acquiescence.³ And, in American probate practice, where bonds are given by the fiduciary, such are the facilities for removing unfaithful executors and administrators and appointing their legal successors, that adequate remedies at law for recovering assets improperly transferred may frequently be found without asking a court of equity to interpose.⁴

§ 358. **Purchase by a Representative at his Own Sale, etc.**—The earlier and more conservative rule is, that an executor or administrator cannot be allowed to purchase from himself any part of the assets, even though making a conduit of the title through some third person; but he shall be considered in such transactions a trustee for the persons interested in the estate, and shall account for the utmost extent of advantage made by him of the subject so purchased.⁵ And hence, a sale by the representative to himself of personalty belonging to the estate, has been treated as fraudulent *per se*, even though made at public auction at a fair price, a third person being the nominal bidder to

¹ *Skrine v. Simmons*, 11 Ga. 401; *Heath v. Allin*, 1 A. K. Marsh. 442. As to the fraudulent pledge or mortgage of assets, see *supra*, § 352.

² *Hill v. Simpson*, 7 Ves. 152; *Wilson v. Moore*, 1 My. & K. 337; *Flanders v. Flanders*, 23 Ga. 249.

³ *Wms. Exrs.* 938; *Elliott v. Merri-*

man, 2 Atk. 41; *McLeod v. Drummond*, 14 Ves. 353; 17 Ves. 152; *Flanders v. Flanders*, 23 Ga. 249.

⁴ See *Mawhorter v. Armstrong*, 16 Ohio, 188; *Hart v. Hart*, 39 Miss. 221.

⁵ *Hall v. Hallett*, 1 Cox, 134; *Watson v. Toone*, 6 Madd. 153; *Wms. Exrs.* 938.

whom the immediate transfer is made.¹ But the preponderance of American decisions tends rather to the conclusion that a purchase of assets by the executor or administrator, or his taking and accounting for the same at their appraised value, may often be really advantageous to the estate, and that such advantage is, after all, the main thing to be considered. They hold that, at all events, a purchase by the representative is not absolutely void, but voidable only by persons interested in the estate at their option;² nor even by them if they have directly sanctioned or acquiesced in the transaction,³ or if, from their laches and delay, acquiescence on their part may legally be fairly inferred to the quieting of title.⁴ The sale will be treated as essentially valid until avoided;⁵ and, while any party interested may apply to have the sale set aside, notwithstanding the acquiescence of the others, it is not for a stranger to exercise any option in the matter.⁶

The representative, moreover, who has advanced his own funds to pay debts of the decedent, is allowed to retain any specific article at a fair valuation, and his purchase at the sale may be treated as evidence of his election accordingly.⁷

A purchase by the representative at his own sale must, however, in order to stand, be fairly in the interest of the estate. If it appear that he purchased the property at less

¹ *Ib.*; *Miles v. Wheeler*, 43 Ill. 123; *Ely v. Horine*, 5 Dana, 398; *Sheldon v. Rice*, 30 Mich. 296.

² *Harrington v. Brown*, 5 Pick. 519; *Mercer v. Newson*, 23 Ga. 151; *Anderson v. Fox*, 2 Hen. & M. 245; *McLane v. Spence*, 6 Ala. 894; *Blount v. Davis*, 2 Dev. 19; *Mead v. Byington*, 10 Vt. 116; *Ives v. Ashley*, 97 Mass. 198; *Gilbert's Appeal*, 78 Penn. St. 266; *Moses v. Moses*, 50 Ga. 9; *Staples v. Staples*, 24 Gratt. 225. And see *Sheldon v. Rice*, 30 Mich. 296.

³ *Williams v. Marshall*, 4 Gill & J. 376; *Lyon v. Lyon*, 8 Ired. 201.

⁴ *Todd v. Moore*, 1 Leigh, 457; *Flanders v. Flanders*, 23 Ga. 249. And see *Miller v. Binion*, 33 Ga. 33.

⁵ *Ib.*; *Dunlap v. Mitchell*, 10 Ohio, 117; *Wms. Exrs.* 938, note by Perkins.

⁶ *Litchfield v. Cudworth*, 15 Pick. 24; *Jackson v. Vandalsen*, 5 Johns. 43; *Wms. Exrs.* 938, Perkins's note; *Lothrop v. Wightman*, 41 Penn. St. 297.

⁷ *Ely v. Horine*, 5 Dana, 398. See 1 Desau. 150.

The mere fact that, long after an administrator's sale the administrator purchased the property from the purchaser at such sale, is not sufficient proof that the fiduciary was substantially a purchaser at his own sale through the medium of another. *Painter v. Henderson*, 7 Penn. St. 48.

than its value, has never accounted for the proceeds, and is insolvent, chancery will set the sale aside, not only as against him, but as against purchasers under him with notice.¹ Where an executor or administrator purchases at his own sale, he may be held accountable for all the profits of the transaction; and if the total profit be uncertain, he is chargeable with the largest amount presumable.² And if he purchase personalty of the deceased, though at public auction, at a less price than the appraised value in the inventory, he is liable to be held to account for the difference.³ In general, if the sale be not avoided, the representative is chargeable, together with the sureties, on his bond, for, at least, the full and true price at which he purchased;⁴ but where the transaction is assailed by a party in interest, with the actual value of the property as nearly as may be.⁵ While such transactions may not be positively illegal, they justify and require a close scrutiny into the good faith and fairness of the transaction; being liable to gross abuses, like the purchase of an attorney from his client or a guardian from his late ward.⁶

It is held that where the representative himself purchases at his sale of the decedent's estate, and uses the assets of the estate in making such purchase, those interested may elect to consider the appropriation a conversion, or may treat him as a purchaser in trust for their benefit.⁷ Courts incline to favor the representative's correction of an inadvertent purchase by himself at his sale of the assets;⁸ but the representative who made the sale is not the proper

¹ *Sheldon v. Woodbridge*, 2 Root. (Conn.) 473; *McCartney v. Calhoun*, 17 Ala. 301; *Lyon v. Lyon*, 8 Ired. L. 201; *McKey v. Young*, 4 Hen. & M. 430.

² *Brackenridge v. Holland*, 2 Blackf. 377.

³ *Griswold v. Chandler*, 5 N. H. 492.

⁴ *Raines v. Raines*, 51 Ala. 237; *Moffatt v. Loughridge*, 51 Miss. 211.

⁵ See *Gilbert's Appeal*, 78 Penn. St. 266.

⁶ *Moses v. Moses*, 50 Ga. 9. Buying in legacies is culpable in a representative. *Goodwin v. Goodwin*, 48 Ind. 584.

⁷ *Julian v. Reynolds*, 8 Ala. 680. And see, as to assignment of stock, belonging to the estate, to the representative personally, *Whitley v. Alexander*, 73 N. C. 444.

⁸ *Cannon v. Jenkins*, 1 Dev. Eq. 422.

person to avoid the transaction to the detriment of another's interests thereby acquired.¹

In fine, according to the better authorities, a purchase by the executor or administrator at his own sale, either directly or indirectly, will, though not absolutely void, be set aside, upon the timely application of any party interested in the estate; and this rule is of general application to sales of trust property.²

§ 359. **Re-opening the Representative's Voidable Transfer, etc.; Relief as against Third Parties.**—Generally speaking, if an executor or administrator sells, mortgages, or pledges any of the personal property of his decedent's estate in payment of or as security for his individual debt, or otherwise, in perversion of his trust, every person who receives any part of this property, as a participator in the representative's breach of trust, is responsible; and the assets wrongfully transferred or disposed of may be reached by creditors, legatees, and distributees or heirs. The relief afforded for the fraud and damage appears to be an equitable one at their election; no adequate or complete remedy existing at law, or none, at all events, where the representative and his sureties are worthless.³

¹ And see *c. post* as to sales of the decedent's real estate.

² Bennett, *Ex parte*, 10 Ves. 381; Davone *v.* Fanning, 2 Johns. Ch. 253; Booraem *v.* Wells, 19 N. J. Eq. 87; Lytle *v.* Beveridge, 58 N. Y. 593.

An ancillary representative will be presumed to have authority, by virtue of his office, to sell a note and mortgage belonging to the estate, in the absence of evidence to the contrary. But where the executor, in the last domicile of the decedent, included in his inventory a note due to his testator from the estate of a deceased debtor who was domiciled in another State, secured by mortgage on land in that State, took out ancillary administration, sold the note and mortgage, and rendered a final account to the probate court of that State,

which was there allowed, it was held that such allowance of the disposition made by him of the proceeds of the note was conclusive in the settlement of his account in the probate court of last domicile as executor; but that the probate court of last domicile, being the place for final and full settlement of the estate, and an account for all the property and effects of the estate wherever found, might inquire into the good faith of the sale, and if it should find that the sale was fraudulent and the executor the real purchaser of the note, could compel him to account for the excess of the value of the note above what he paid for it. Clark *v.* Blackington, 110 Mass. 369. See *supra*, § 181.

³ McLeod *v.* Drummond, 17 Ves. 153; 4 Brown, C. C. 127, 139; Bean *v.* Smith,

§ 360. **Personal Representative cannot avoid his own Voidable Transfer, etc.** — But the representative cannot avoid his own sale or pledge, though guilty of a breach of trust in making it. It may be needful and proper to remove him from the trust and appoint another; but such a removal is not for the purpose of reaching the assets themselves, but preparatory rather to holding the delinquent representative to account, and suing him and his bondsmen for maladministration. If the unfaithful representative dies or is removed in fact, and a representative *de bonis non* is appointed, the rule is that the latter cannot avoid the wrongful transfer of his predecessor, except where there are local statutes in force authorizing a representative *de bonis non* to do what otherwise creditors, legatees, or distributees could alone have done.¹

§ 361. **Whether the Representative warrants Title when he sells.** — Where an executor or administrator sells or transfers personal property of the decedent, there is an implied representation to the purchaser that he is the legal representative of the estate, and has general authority to make such sale or transfer; and, should it prove the reverse, the purchaser or transferee may, it is held, be relieved from the contract in equity.² Jurisdiction in the premises, regular procedure by virtue of his office, is what an executor or administrator warrants by implication. But, in sales or transfers by executors or administrators, there is no implied warranty of the title; and the purchaser or transferee acquires only the decedent's rights in the property, subject to his incumbrances; so that, in the absence of fraud or an express warranty on the representative's part, and an eviction, the buyer or transferee cannot hold him personally answerable nor the estate.³ Indeed,

² Mason, 271; Monell v. Monell, 5 Johns. Ch. 297; Riddle v. Mandeville, 5 Cranch, 322; Field v. Schieffelin, 7 Johns. Ch. 150; Dodson v. Simpson, 2 Rand. 294; Thomas v. White, 3 Littell, 180. And see *supra*, § 297.

¹ Stronach v. Stronach, 20 Wis. 129, 133, and cases cited; Hagthorp v. Neale, 7 G. & J. 13; Herron v. Marshall, 5 Humph. 443. See c. 6, *post*.

³ Crisman v. Beasley, 1 Sm. & M. Ch. 561; Woods v. North, 6 Humph. 309. In case of a sale under a void judicial order, the purchaser is not bound to pay the purchase-money and complete his title. Beene v. Collenberger, 38 Ala. 647; Michel, Succession of, 20 La. Ann. 233.

² Mockbee v. Gardner, 2 Har. & G. 176.

the purchaser from an executor or administrator takes the risk of the worthlessness of the decedent's title; and he must pay the price, as it is held, even though that title should utterly fail, no deceit having been practised upon him.¹ Where, however, the purchase-money remains in the representative's hands still undistributed, it is equitable and just, as other cases affirm, that the representative should refund to the purchaser in such a case.² And fraudulent representations made by the representative at the sale may be relied upon by the purchaser who was misled, so as to avoid the sale, or in abatement of the price agreed upon.³ In respect of warranty, therefore, executors, administrators, and other trustees constitute exceptions to the familiar rule that there exists in every sale of personal property an implied warranty of title.⁴

But even here, if fraud taints the transaction, or if there has been an express warranty and eviction, the representative makes himself personally liable to the purchaser for the consequences.⁵ It becomes a question, therefore, whether an express warranty which the representative makes, outside

¹ *Cagar v. Frisby*, 36 Miss. 178; *Stanbrough v. Evans*, 2 La. Ann. 474. But see *White, Succession of*, 9 La. Ann. 232. A fairer rule would be, that, unless in such a case the sale has been completed by payment of the money, the purchaser need not pay; but at all events, he cannot hold an innocent representative personally liable should the title fail; though the loss might here fall properly upon the estate. The indemnity of the representative is what the law chiefly insists upon in such instances.

² *Mockbee v. Gardner*, 2 Har. & G. 176.

³ *Able v. Chandler*, 12 Tex. 88.

⁴ See 2 Schoul. Pers. Prop. 381 *et seq.* as to warranty in sales; *Chapman v. Speller*, 14 Q. B. 621; *Blood v. French*, 9 Gray, 197; *Brigham v. Maxley*, 15 Ill. 295; *Bartholomew v. Warner*, 32 Conn. 98. The reason for this exemption from personal responsibility

is derived from the nature of the office held by the representative or trustee. "For who," observes Archer, J., in *Mockbee v. Gardner*, 2 Har. & G. 177, "would accept an office of this kind, if he were to become necessarily the guarantee of the good title of him whom he represents, in all the property submitted to his charge which he may be obliged by order of the court to sell? In all cases in which the title sold was ascertained to be defective, after a final distribution of the estate, the administrator, if a recovery were had against him, would have to look for indemnity to creditors, distributees, and legatees. In most instances his prospect of security would never be realized, and no power is given him to retain for such a contingency."

⁵ *Mockbee v. Gardner*, 2 Har. & G. 176; *Sumner v. Williams*, 8 Mass. 162; *Buckels v. Cunningham*, 14 Miss. 358; *Able v. Chandler*, 12 Tex. 88.

the usual scope of his official authority, binds the estate and not himself alone. Some courts have considered that the representative is competent to warrant either the title or the soundness of personal property of the deceased which he offers to sell, so that if the transaction, as between the purchaser and himself, be fair and *bond fide*, the warranty will obligate the estate; or, in other words, that the power to warrant, on his part, is incidental to the general right to sell, pledge, or mortgage.¹ But local statutes may, upon a fair construction, be found to regulate this whole matter.² An estate ought not to profit unjustly where prevention may be seasonable.³ Yet it would appear the better opinion that a personal representative cannot positively bind his decedent's estate, when he transcends the usual limits of his authority, and warrants the decedent's title absolutely or the soundness of the thing he offers.⁴ This latter rule, though sometimes operating harshly, is found, after all, the most convenient for facilitating a prompt and equitable settlement of the estate; and each purchaser, being put on his own guard in such transactions, should inquire into the title for himself, or offer a less price in consideration of the risk he runs.⁵

§ 362. **Sales of Negotiable Instruments by the Representatives.**—An executor or administrator has a right, which is inherent in the office, to sell or otherwise transfer promissory notes, bills of exchange, or other negotiable instruments belonging to the decedent's estate, as well as corporeal chattels, and under corresponding qualifications.⁶ For his

¹ Craddock v. Stewart, 6 Ala. 77, 80.

² Ib. As to mortgages where one sells with warranty, see 3 Mason, 285; 2 Whart. 420.

³ Williamson v. Walker, 24 Ga. 257; Crayton v. Munger, 9 Tex. 285.

⁴ Ramsey v. Blalock, 34 Ga. 376; Lynch v. Baxter, 4 Tex. 431.

⁵ If the representative seeks, by making express warranty, to make a better sale for the estate, he may well secure himself by getting distributees or others in interest to obligate themselves

personally in return; or they may themselves undertake to make express warranty to the purchaser.

The representative sometimes sells with authority from a sole legatee or distributee. See Kelso v. Vance, 58 Tenn. 334.

⁶ Rawlinson v. Stone, 3 Wils. 1; Wms. Exrs. 943; Gray v. Armistead, 6 Ired. Eq. 74; Rand v. Hubbard, 4 Met. 258; Cleveland v. Harrison, 15 Wis. 670. And see Nelson v. Stollenwerck, 60 Ala. 140.

authority to dispose of personal property extends to the disposition of incorporeal kinds and their muniments of title, excepting, perhaps, for those common-law barriers against assignment, which, in modern practice, have been well-nigh swept away.¹ And the purchaser of such instruments in good faith will acquire a good title, even though purchasing at a discount, unless he is chargeable with knowledge of a fraudulent perversion on the representative's part.² Should the representative dispose improperly of such assets and the rights thereunder, he may be rendered liable on his bond; yet this will not affect the title of an indorsee, assignee, or other transferee who takes the instrument in good faith and for value.³

But, following the rule elsewhere noticed, the transfer of a note due to the estate by the representative in payment of his own debt, or as security for it, gives to the transferee with notice no right of recovery.⁴ On the other hand, if a balance be justly due to the representative on the settlement of his accounts, to the amount of the negotiable instrument, it is no fraud in him to sell and appropriate such instrument to the payment of his debt.⁵

The representative may, by indorsement or the other usual means, guaranty payment of the instrument he transfers; but by doing so he binds himself personally, and not the estate,⁶ and consequently the form of assigning or

¹ See 1 Schoul. Pers. Prop. 96-109, as to the old distinction between corporeal and incorporeal, or *choses in possession* and *choses in action*, with the common-law rule of assignment.

² Gray v. Armistead, 6 Ired. Eq. 74. See Munteith v. Rahn, 14 Wis. 210.

³ Hough v. Bailey, 32 Conn. 288; Wilson v. Doster, 7 Ired. Eq. 231; Walker v. Craig, 18 Ill. 116; Speelman v. Culbertson, 15 Ind. 441. Under the codes of some States, the rule is otherwise. Burbank v. Payne, 17 La. Ann. 15.

As to application of the statute of limitations to such transactions, see Cleveland v. Harrison, 15 Wis. 670; next chapter.

⁴ Latham v. Moore, 6 Jones Eq. 167; Scranton v. Farmers' Bank, 24 N. Y. 424; Scott v. Searles, 15 Miss. 498; Smartt v. Watterhouse, 6 Humph. 158; Williamson v. Morton, 2 Md. Ch. 94; *supra*, § 352.

⁵ Ward v. Turner, 7 Ired. Eq. 73.

⁶ Robinson v. Lane, 22 Miss. 161; *supra*, § 258. Generally speaking, there is no difference between an indorsement of a note by the deceased and one by his personal representative. Watkins v. Maule, 2 Jac. & W. 243; Wms. Exrs. 943. For a case of incomplete indorsement and delivery of a note belonging to an estate, see Bromage v. Lloyd, 1 Ex. 32. And see 37 Miss. 526.

indorsing should, as a rule, be so prudently expressed that no recourse can be had either against him or the estate he administers upon.¹

As the representative may sell and dispose of a note or other negotiable instrument belonging to the estate, so may he dispose of it with pledge or mortgage security accompanying it, and assign and transfer accordingly.¹ Even a mortgage secured upon real estate passes with the principal indebtedness as personal property, if unforeclosed, and may be assigned by the representative.²

An executor or administrator may, under proper circumstances, sell a negotiable instrument or other incorporeal *choses* at a price below the nominal amount, as he certainly may for a price above it;³ for the pursuance of official duty with integrity and reasonable prudence is here, as in sales of things corporeal, the standard by which his transactions should be tested.

§ 363. **Representative's Authority to purchase.**—The power of an executor or administrator to purchase follows the general doctrine of his authority to sell, invest, and re-invest.⁴ An unauthorized purchase is voidable at the election of those in interest. Under the circumstances presented in some particular transaction, it may be matter of inquiry whether the purchase made by a representative was on his individual account or for the use of the estate; and here, not only formal instruments of title, but also the means of payment used, and the advantageous or disadvantageous character of the transaction may be taken into consideration.⁵ If the representative misapplies funds of the estate in a purchase, fraudulently or unreasonably, he may be held accountable on his bond for the misapplication; and where the seller was cognizant of his breach of trust, those interested

¹ *Ely v. Williams*, 13 Wis. 1. See *Gray v. Armistead*, 6 Ired. Eq. 74. And see 55 Miss. 278; 57 Ga. 232.

² *Cleveland v. Harrison*, 15 Wis. 670; ⁴ See *supra*, § 322, as to investments.
Miller v. Henderson, 10 N. J. Eq. 320; ⁵ *Colvin v. Owens*, 22 Ala. 782;
supra, § 214. *Harper v. Archer*, 28 Miss. 212.

³ *Wheeler v. Wheeler*, 9 Cow. 34;

in the estate and injured thereby may bring a bill in equity to compel the seller to refund the purchase-money and place them *in statu quo*.¹

§ 364. **The same Subject.** — As in other cases, so upon his own contract of purchase, the personal representative binds himself individually to those with whom he deals, whether the estate may reimburse him or not.²

¹ Trull *v.* Trull, 13 Allen, 407; *supra*, § 352.

² 3 Port. 221; Lovell *v.* Field, 5 Vt. 218.

CHAPTER V.

LIABILITY OF AN EXECUTOR OR ADMINISTRATOR.

§ 365. **Liability in Respect of Acts of Deceased or his Own Acts.**—The liability of an executor or administrator may accrue (1) in respect of the acts of the deceased; or (2) in respect of his own acts. These two subjects will be considered separately.

§ 366. **Liability in Respect of Acts of Deceased; Survival of Actions against the Decedent founded in Contract.**—*First*, as to liability in respect of the acts of the deceased. We have elsewhere considered what actions survive in favor of the estate, where the decedent was plaintiff.¹ A corresponding principle applies as to the survival of actions brought against the decedent during his lifetime. Accordingly, it has long been settled in our law, that causes of action which are founded in any contract, duty, or obligation of the decedent, and upon which the decedent himself might have been sued during his lifetime, will survive so as to continue enforceable against his estate.² Consequently, the executor or administrator is legally answerable, so far as the assets in his hands may enable him to respond, for debts of every description which were owing by the deceased, whether debts of record, such as judgments or recognizances; debts due on special contract, as for rent in arrears, or on bonds, covenants, and other sealed contracts, or debts by simple contract, such as bills and notes, and promises expressed orally or in writing.³

It is said in this connection that there is no difference between a promise to pay a debt certain, and a promise to do a

¹ *Supra*, § 277.

² Wms. Exrs. 1721; 1 Saund. 216 a; Atkins v. Kinnan, 20 Wend. 241.

³ Bac. Abr. Executors, P. 1; Wms. 366.

Exrs. 1721; Noy, 43; Dyer, 344 b; Smith v. Chapman, 93 U. S. Supr. 41; Harrison v. Vreeland, 38 N. J. L.

collateral act, which is uncertain, resting only in damages, such as a promise by the decedent to give such a fortune with his daughter, or to deliver up such a bond ; for wherever in this latter class of cases the decedent himself was liable to an action, his representative shall be liable also.¹ Even where the cause of action sounds in damages, as for loss of one's money or one's chattels through the negligence of the deceased, the latter being an attorney-at-law, or a common carrier, and the damages being laid as for breach of his contract, the action will survive against the representative.²

This survival of actions, founded in the decedent's contract liability, does not require any express reference in the contract itself to the contingency of death, nor in so many words to one's executors or administrators ; for the contract, if not personal in its nature, implies of itself that death shall not cut off the survivor's remedies.³ And executors or administrators, being but officials commissioned to wind up the decedent's estate, that estate as of course goes first towards discharging all lawful claims and demands against the deceased which may be outstanding at his death.⁴

§ 367. **The same Subject; Exception as to Personal Contracts of the Deceased.**—But a distinction is here to be taken in favor of contracts of a personal nature, or such as are essentially limited in scope by one's lifetime, and other obligations. A contract to deliver 1,000 cartridges may be fulfilled, or a note for \$1,000 paid off, by one's assignees or personal representatives, notwithstanding his own death, provided assets suffice for sustaining the liability ; and such contracts are generally made upon some consideration of reciprocal advantage, which the death of either party should not *ipso facto* annul ;

¹ Bac. Abr. Executors, P. 2 ; Cro. Jac. 404, 417, 571, 662 ; Wms. Exrs. 1722. Cf. Miller v. Wilson, 24 Penn. St. 114 ; Long v. Morrison, 14 Ind. 595.

² Bradbury v. Morgan, 1 H. & C. 249 ; 2 Mod. 268 ; Bac. Abr. Exors. P. 1 ; Wms. Exrs. 1724 ; 3 Bulstr. 30 ; Williams v. Burrell, 1 C. B. 402. ³ Knights v. Quarles, 2 B. & B. 102 ; Cowp. 375 ; Alton v. Midland R. 19 C. B. N. S. 242 ; Wms. Exrs. 799, 1722 ; Wilson v. Tucker, 3 Stark. N. P. 154. ⁴ See c. post as to the payment of debts, etc., against an estate.

designating, furthermore, some date hereafter at which the obligation shall mature, regardless of every such contingency. There are no such personal considerations involved in a contract of this sort that an assignee might not discharge, as well as the original contractor. Such an obligation, profitable or unprofitable, and as for fulfilment or damages, the survivor enforces against the decedent's estate, nor does death cancel it. But where the contract was personal to the testator or intestate himself; as, for instance, to instruct an apprentice, to employ a particular servant; being an author, to compose a certain book, or, as an experienced architect, to plan a building; or, as a soldier, to serve in the army, or, in general, for hiring; the case is different. Here, it may be assumed, that unless the contract expressly provides differently (as in some instances it may), death necessarily severs the relation and puts an end to that legal obligation which has, without fault of the contractor, become impossible of performance. In such instances the estate of the decedent is relieved of all further liability under the contract;¹ though, for any breach of such a contract committed during the decedent's lifetime, the executor or administrator must of course respond out of the assets, as in other cases. Act of God preventing or terminating the performance of a personal contract, is held

¹ Cro. Eliz. 533; *Siboni v. Kirkman*, 1 M. & W. 423; *Robinson v. Davison*, L. R. 6 Ex. 269; *Smith v. Wilmington Coal Co.*, 83 Ill. 498; *Wentworth v. Cock*, 10 Ad. & El. 45; *Wms. Exrs.* 1725; *supra*, § 278; *Bland v. Umstead*, 23 Penn. St. 316. A contract to support a parent is personal, and does not bind the representative. *Siler v. Gray*, 86 N. C. 566. There may be various contracts of a personal nature brought under this rule, and *vice versa*, the courts making it matter of judicial interpretation. Thus, a covenant by B. not to exercise a certain business, but to solicit business regularly for A., upon a certain consideration, does not bind B.'s widow as such. *Coke v. Colcroft*, 2 W. Bl. 856. On the other hand, one might so clearly have contracted with a servant or artisan for a fixed period, that, if he died meantime, his representatives would be bound to find employment or pay for the remaining period at the cost of the estate. The line of distinction sometimes runs very closely. *Cf. Wentworth v. Cock*, 10 Ad. & E. 45, where a contract to supply materials for a certain number of years was treated as obligatory on the representatives of the deceased contractor, and therefore as entitling them to the profits accruing from a proper fulfilment on their part, with *Dickenson v. Callahan*, 19 Penn. St. 227, where the contrary interpretation was given. And *cf.* as to the representative's liability for advances made after the decedent's death on a continuing guaranty, *Bradbury v. Morgan*, 1 H. & C. 249; *Wms. Exrs.* 1770.

to excuse it; and even sickness or disability may justify its breach during one's life.¹

The personal nature of a contract applies with similar force as between those who have occupied the relation of master and servant, or principal and agent. One's clerk or agent is discharged, presumably, by the employer's death; and where the employment was by a firm, the death of one of the partners, while dissolving the firm, dissolves likewise the relation with the person employed, even though a stated term of employment has not yet run out.² The authority of an agent is commonly revoked by the death of his principal; and consequently the agent cannot commonly sue the executor or administrator for services performed after the principal's death, though this were upon a contract made for a fixed period with the decedent himself; for, upon notice of death, he should cease performance or else get a new personal authority elsewhere.³ The rule of apportionment, custom, statute, or express contract, all seek to mitigate, however, the harsh consequence of such a doctrine.⁴ And, conversely, the death of the agent, servant, or person hired or employed, operates similarly against the principal, master, or employer, where the law is left to operate naturally.⁵

But where the contract between the parties was expressed in writing, the language, scope, and intendment of the instrument must be considered in instances like the foregoing. Thus, if one covenants personally in a lease, his death may be held to discharge his estate and his personal representatives from all obligation further than performing the covenant during his own life. But, as leases commonly run, this would be quite exceptional; and covenants usually bind one's executors, and administrators, and assigns, during the full period, in express terms.⁶

¹ Schoul. Dom. Rel. § 474.

² Tasker v. Shepherd, 6 H. & N. 575.

³ Campanari v. Woodburn, 15 C. B. 400; Wms. Exrs. 1727.

⁴ Schoul. Dom. Rel. § 473.

⁵ Ib. See Powell v. Graham, 7 Taunt. 580.

⁶ Touchst. 178, 482; Wms. Exrs.

1726; Williams v. Burrell, 1 C. B. 402.

So a covenant to *maintain* an apprentice is held to continue in force after the master's death, while a covenant to *instruct* him does not. Wms. Exrs. 1765; 1 Salk. 66.

§ 368. **The same Subject; Distinction between Gifts and Contracts.** — So, too, an obligation enforceable after one's death, against his estate, must have been founded in a contract consideration. Gifts to take effect after death stand upon the footing of legacies or gifts *causa mortis*, and if valid at all, must be referred to the peculiar rules which apply thereto.¹ As a court of equity will not *inter vivos* compel any one to complete his gift, neither will it compel one's executor or administrator to complete it on his death. Hence, an act of pure bounty, not fully performed by the decedent during his lifetime, cannot be specifically enforced against the estate or its representative.² And hence, too, although a promise by the decedent of recompense for services rendered may be sued upon, even though the promised recompense was to have been by way of a legacy which the decedent did not in fact leave to the plaintiff, no mere expectation of a legacy, gift, or gratuity, can furnish ground for bringing a suit against the estate. Nor can the representative be sued upon any mere writing, though under seal, which purports to make a voluntary gift after one's decease, out of his estate; for this would contravene the policy of our statutes of wills.³

§ 369. **The same Subject; Form of Action sometimes Material in this Connection.** — The form of action appears sometimes material in connection with suits against the representative touching the obligation of the decedent. But modern practice, both in England and the United States, generally abolishes a distinction formerly taken as to "wager of law," so that the action of debt on simple contract is maintainable, as well whether the contract was made by the decedent or by his personal representative.⁴

¹ See *c. post* as to legacies; *supra*, § 219.

² Hooper *v.* Goodwin, 1 Swanst. 485; Callaghan *v.* Callaghan, 8 Cl. & Fin. 374; Dillon *v.* Coppin, 4 My. & Cr. 637. And see Shurtleff *v.* Francis, 118 Mass. 154; Stone *v.* Gerrish, 1 Allen, 175; Schoul. Dom. Rel. 3d ed. § 274; Wms. Exrs. 1768, and Perkins's note. A promise that one's representative shall pay A. £20, in consideration that

A. remains in his service till his death, is enforceable within the rule of the text. Powell *v.* Graham, 7 Taunt. 580. Cf. Cro. Eliz. 382; Wms. Exrs. 1728. See also Bell *v.* Hewitt, 24 Ind. 280.

³ Baxter *v.* Gray, 3 M. & G. 771; Le Sage *v.* Coussmaker, 1 Esp. 188; Nield *v.* Smith, 14 Ves. 491.

⁴ Wms. Exrs. 1930, 1931; 9 Co. 87 b; Riddell *v.* Sutton, 5 Bing. 206; stat.

§ 370. **Survival of Actions against Deceased founded in Tort; not permitted at Common Law.** — Where, on the other hand, the cause of action against the decedent was founded in tort, and not contract, it was the common-law rule that the right of action to recover damages died with the person who committed the wrong. Consequently, wherever an injury had been done to the person or property of another for which damages only could be recovered, as for one's wilful misconduct or negligence, the death of the wrong-doer before judgment precluded legal redress. Thus, one's executor or administrator could not be sued for false imprisonment, assault and battery, slander, libel, malicious prosecution, or any other personal injury inflicted by the decedent, whether mental or physical.¹ Nor for trespass, trover, or deceit; nor for causing damage by a nuisance, diverting a water-course, or obstructing lights.²

The right of action for default and embezzlement, in trusts public or private, died upon the same principle with the offender.³ So, if the executor or administrator himself committed waste and died, it was treated as a personal tort which died with his own person, saving his estate harmless;⁴ though equity prescribed a different rule;⁵ while, upon one's official bond, moreover, suit might perhaps lie as upon a contract liability.⁶

Liability on a penal statute or under a subpoena dies with the person at common law.⁷ Also, the liability of a marshal, sheriff, or jailer, for permitting an escape, or for other malfeasance or neglect of himself or his deputies.⁸

3 & 4 Wm. IV. c. 42. Other actions were substituted at common law in the stead of those which did not survive under the rule of the text. Cowp. 375, by Lord Mansfield. And see *Thompson v. French*, 10 Yerg. 452.

¹ Wms. Exrs. 1728; 1 Saund. 216 a; *Waters v. Nettleton*, 5 Cush. 544; *More v. Bennett*, 65 Barb. 338.

² *Perry v. Wilson*, 7 Mass. 395; *Hawkins v. Glass*, 1 Bibb, 246; *Nicholson v. Elton*, 13 S. & R. 415; *Jarvis v. Rogers*, 15 Mass. 398; Wms. Exrs. 1728.

³ *Franklin v. Low*, 1 Johns. 396.

⁴ 3 Leon. 241; 1 Ventr. 292; Wms. Exrs. 1729.

⁵ *Price v. Morgan*, 2 Chanc. Cas. 217; Wms. Exrs. 1739. Equity charges trustees and their representatives with the consequences of a breach of trust. *Ib.*

⁶ *Supra*, § 366.

⁷ Wms. Exrs. 1728; Wentw. Off. Ex. 255, 14th ed.

⁸ *Ld. Raym.* 973; *Hambly v. Trott*, 1 Cowp. 375; Wms. Exrs. 1729; *Martin v. Bradley*, 1 Caines, 124; *People v.*

But if judgment had been recovered against the person committing the wrong, during his life, the judgment debt would have bound the estate; for as to the foundation of that judgment, whether in a cause of action which survives or not, there is no essential difference; the judgment itself creating a new and distinct obligation of the contract kind.¹

§ 371. **The same Subject; whether Replevin can be maintained against the Representative.** — In replevin, if the plaintiff died, the cause of action appears to have survived at the common law; but, if the defendant died, the right of action against him died also; so that, although the personal representatives of a party from whom goods or chattels had been tortiously taken in his lifetime might bring replevin, no such action could be maintained against the personal representatives of one who, in his lifetime, had tortiously possessed himself of goods, unless the property came into the possession of the personal representatives, and they refused to restore it.²

§ 372. **The same Subject; whether other Remedies might be applied because of the Tort.** — While actions declaring as for a tort committed by the defendant were thus defeated or abated by such party's death, other remedies against his estate might sometimes avail for the injured person's redress, provided the form of declaration were different. As, perhaps, in bringing detinue to recover chattels *in specie*;³ or where the form of action was *ex contractu*;⁴ and, generally, if the wrongful act might be laid to the executor or administrator himself, or else, waiving the tort, an action might be

Gibbs, 9 Wend. 29. See *Lynn v. Sisk*, 9 B. Monr. 135.

¹ Wms. Exrs. 1740; Dyer, 322 a; *supra*, § 366.

² In replevin, the plaintiff's ground of action is his property, either general or special, and a tortious violation of his right of property by the defendant. *Parsons, C. J., in Mellen v. Baldwin*, 4 Mass. 481; *Lahey v. Brady*, 1 Daly, 443; *Potter v. Van Vranken*, 36 N. Y. 619, 627, *per Davies, C. J.*; Wms. Exrs. 1730, appears to state this point differently.

³ Wms. Exrs. 1730; *Le Mason v. Dixon*, W. Jones, 173; 3 Dev. L. 303; 1 Leigh, 86. Detinue, unlike replevin, is for detaining unlawfully rather than tortiously acquiring. But see *Jones v. Littlefield*, 3 Yerg. 133, to the effect that detinue cannot revive as for an act committed by the decedent himself.

⁴ See *supra*, § 366. As to suing for breach of promise, see *Shuler v. Millsaps*, 71 N. C. 297; 2 Chitty Contr. (11th Am. ed.) 1443.

brought as upon an implied contract, or for money had and received.¹ As in various other instances, the common law, while insisting upon a legal maxim which, rigidly applied, might work injustice, favored artifice and the dexterous application of forms for correcting the worst mischief; so that its courts might render a righteous judgment while maintaining the severe aspect.

§ 373. **Modern Statutes enlarge the Survival of Actions against Decedent.**—As, however, with actions on behalf of a decedent's estate,² so where the decedent was defendant, modern legislation, both in England and the United States, favors an enlargement of the causes where survival shall be allowed; and often, too, by the same enactment. Thus, under the English stat. 3 & 4 Wm. IV. c. 42, an action of trespass is maintainable against the executor or administrator of any person deceased, for an injury to property, real or personal, committed within six months before his death; provided the action be brought not later than six months after the representative shall have taken administration.³ And in many American States the survival of actions for torts of a decedent is still more widely extended, so as not only to embrace causes grounded in an injury to one's person or character, but to permit of replevin and various other forms of action without particular limitation as to the time when the offence was committed.⁴ But, whether directly

¹ As in *assumpsit*. 1 Cowp. 375; *Collen v. Wright*, 7 El. & Bl. 647. Or action for use and occupation. *Ib.* And see, as to money for which a sheriff was liable to account, *Perkinson v. Gilford*, Cro. Car. 539; Wms. Exrs. 1730, 1731; *United States v. Daniel*, 6 How. (U. S.) 11. In general, as to waiving the tort and all special damages, and suing as for the proceeds, etc., see 1 Chitty Pl. (16th Am. ed.) 112, Perkins's note.

² *Supra*, § 282.

³ Wms. Exrs. 1734; *Powell v. Rees*, 7 Ad. & El. 426.

⁴ Deceit, malpractice, etc., are thus in some States made a good cause of

action notwithstanding the offender's death. See the special causes (embracing bodily injuries) enumerated in Mass. Pub. Stats. c. 165, § 1; *Nettleton v. Dinehart*, 5 Cush. 543. And see also *Shafer v. Grimes*, 23 Iowa, 550; 1 Chitty Pl. 58, note; *supra*, § 282; *Haight v. Hoyt*, 19 N. Y. 464. The reader is referred to the statutes of the respective States on this subject.

Damages actually sustained, and not exemplary or vindictive damages, may be recovered. Mass. Pub. Stats. c. 166. As to the form of judgment in replevin, see *ib.* All actions which would have survived if commenced by or against

or by implication, such statutes appear to conform to the general policy which accords to executors and administrators, not themselves in default, a special and brief period of limitations, in order that they may settle up the estate expeditiously and upon a full knowledge of the claims for which officially they shall be held answerable.¹

§ 374. **Survival of Actions for Rent or Damage to Real Estate.** — Rent due from a decedent may be recovered, whether the remedy be by action for use and occupation, or, perhaps (in case of a written lease), as under the stipulations of a sealed contract.² But recovery in ejectment raised technical difficulties, which have now become of little practical consequence.³ At the common law, an action of trespass for mesne profits while one was wrongfully in possession could not be brought against his executor or administrator;⁴ though a bill in equity for an account of mesne profits was under special circumstances sustained.⁵

Waste, moreover, did not lie against the representative at the common law; this being a tort which died with the person who committed it. Yet, upon the decedent's tort, as for instance in cutting down trees or digging coal, there might accrue the less remunerative right of action against the representative, as for money received by selling it.⁶ Or a bill in equity might lie for account.⁷ So, if a man committed equitable waste and died, as where a tenant for life abused his power by cutting down ornamental trees, equity

the original party in his lifetime may be commenced and prosecuted by and against his executors and administrators. Mass. Pub. Stats. c. 166, § 1; 6 Jones, 60.

¹ See *post* as to payment of debts.

² *Turner v. Cameron's Co.*, 5 Ex. 932; Wms. Exrs. 1731.

³ Wms. Exrs. 1731; *Pulteney v. Warren*, 6 Ves. 86; *Birch v. Wright*, 1 T. R. 378; *Jones v. Carter*, 15 M. & W. 718.

⁴ *Pulteney v. Warren*, 6 Ves. 86;

Wms. Exrs. 1731; *Harker v. Whitaker*, 5 Watts, 474.

⁵ *Ib.*; *Caton v. Coles*, L. R. 1 Eq. 581.

⁶ 2 Saund. 252; Cowp. 376; Wms. Exrs. 1732; *Powell v. Rees*, 7 Ad. & El. 426; *Moore v. Townshend*, 33 N. J. 284. The foundation of this action appears to be the benefit the personal estate of the decedent has derived in consequence of the waste. *Ib.*; *Taylor Landl. & Ten.* § 689.

⁷ 1 P. Wms. 406.

asserted jurisdiction to make his personal representatives accountable for the produce thereof.¹

The executors and administrators of a tenant for years, however, are punishable for waste committed by themselves while in possession of the land, as other persons are.²

§ 375. **Liability of Representative on Covenants of his Decedent; Covenants under Lease, etc.** — Wherever the decedent was bound by a covenant whose performance was not personal to himself and terminable by his death, his executor or administrator shall also be bound by it, even though not named in the deed. And whether the covenant was broken during the life of the decedent or after, so long as it was a continuing and express covenant, and the appropriate rule of limitations leaves the estate still unsettled in the representative's hands, the latter is answerable in damages for its breach.³ For the benefits of a covenant and its burdens are transmitted to the representative together; not, however, where it is clear that the covenant applied only to the covenantor personally and was limited to his own lifetime.⁴ Upon all covenants by the decedent broken during his lifetime, even though they were personal to the decedent in liability, the personal representative is, of course, answerable for the breach out of the assets.⁵

Although a covenant in a lease should be of a nature to run with the land, so as to make the assignee thereof liable for any breach committed after its assignment, and although the lessor has accepted the assignee as his tenant, yet a concurrent liability on the covenant may, nevertheless, continue, so as to charge the original lessee and his execu-

¹ *Lansdowne v. Lansdowne*, 1 Madd. 116; Wms. Exrs. 1732, 1733.

² *Taylor Landl. & Ten.* § 689. For statute changes on this point see *Taylor Landl. & Ten.* § 689.

³ 3 Mod. 326; *Wells v. Betts*, 10 East, 316; *Hovey v. Newton*, 11 Pick. 421; Wms. Exrs. 1750; *Taylor Landl. & Ten.* § 669. Thus, damages for breach of a covenant for quiet enjoyment under a lease accruing both before and

after the death of the covenantor may be recovered in one action against his personal representative. 11 Pick. 421. The rule is stated differently as to mere covenants in law, not express. Wms. Exrs. 1752.

⁴ *Coffin v. Talman*, 8 N. Y. 465; *Taylor Landl. & Ten.* § 460. As, e.g., a covenant to repair. *Ib.*

⁵ *Wentw. Off. Ex.* 251; Wms. Exrs. 1750.

tor or administrator.¹ And hence, the personal representative who sells the lease may well require of the purchaser a covenant for indemnity against the payment of rent and performance of covenants; though, independently thereof, he will have his remedies over against his assignee to that intent.²

If in possession of premises under a covenant, the executor or administrator may be sued in covenant as assignees, for they are assignees in law of the interest of the covenantor.³ But, for a breach committed in the time of the decedent, the judgment must be out of his assets, and the representative should be sued in that character.⁴ Leases pass to one's executor or administrator as chattels real or personal assets, with all incidental benefits and burdens; and the rule is general, that an assignment of the lease will not, of itself, affect the liability of the lessee or his personal representative to the lessor upon the covenants therein contained;⁵ though an assignment or surrender with the lessor's consent, and duly accepted by him, may practically terminate the original lessee's responsibility as by mutual consent.⁶

§ 376. **Liability of the Personal Representative for Rent.**—The personal representative's liability for rent follows, so far as may be, the foregoing doctrines. For a promise under seal to pay rent constitutes a covenant, and justifies for its breach an action of covenant;⁷ though there may be a tenancy without a lease, and of a more precarious nature. Assignment of a lease by the lessee during his

¹ Wms. Exrs. 1750; Taylor Landl. & Ten. § 669; Greenleaf v. Allen, 127 Mass. 248. *Aliter*, where the decedent himself was assignee of an original lessee; for here all future liability may be discharged if the representative assigns over, though to a pauper. Rowley v. Adams, 4 My. & Cr. 534.

² Wilkins v. Fry, 1 Meriv. 265; Moule v. Garrett, L. R. 5 Ex. 132; Wms. Exrs. 1752.

³ 1 Ld. Raym. 453; Montague v.

Smith, 13 Mass. 405; Taylor Landl. & Ten. § 669; 16 Hun, 177.

⁴ *Ib.*

⁵ Dwight v. Mudge, 12 Gray, 23.

⁶ Deane v. Caldwell, 127 Mass. 242. See as to assigning a lease, etc., *supra*, § 353.

⁷ Damages for breaches of a covenant to pay rent, before and after the death of the lessee, may be recovered in one action against his personal representative. Greenleaf v. Allen, 127 Mass. 248.

life, or by his personal representative after his death, cannot of itself avail to clear the estate of responsibility for rent; though an assignment or underlease, not contrary to express restrictions of the original lease, may replenish the assets in this respect.¹ But a surrender of the lease by the executor or administrator being absolutely accepted by the lessor, without any reservation of a right to sue the representative, or to prove against the decedent's estate in case of any possible loss occasioned by letting the premises at a reduced rent, the lease terminates, and all liability upon the covenants thereof, and no further rent need be paid.²

But, as respects a liability for rent more generally, the executor or administrator is chargeable with rent in arrear at the time of his decedent's death.³ The action of debt lay at common law for the rent of lands demised, whether for life or for years or at will; the right to sue being founded either on the contract implied from privity of estate or on the express contract of demise. But the right of action on the contract thus implied is transferred with the estate; whereas the lessee under an express contract cannot discharge himself from liability by his own act.⁴ Hence, as long as the lease continues, and as far as he has assets, an executor is held liable, in debt as well as covenant, for accruing rent, and an assignment of the term by himself or his decedent affords, of itself, no immunity.⁵ If, however, after such assignment of the lease, the lessor has accepted rent from the assignee, and recognizes the latter as his own tenant, debt no longer lies against the lessee, or his executor or administrator, as to rent subsequently

¹ Taylor Landl. & Ten. §§ 402-413; Smith, ib. 115-119; 1 Schoul. Pers. Prop. 60; 3 Mod. 325; *supra*, § 353.

² Randall v. Rich, 11 Mass. 494; Deane v. Caldwell, 127 Mass. 242.

³ Shepherd Touch. 178, 483; Taylor Landl. & Ten. § 459.

⁴ Howland v. Coffin, 12 Pick. 105. Debt against the representative, whether to be brought as for *debet* and *detinet* or for *detinet* only, see Taylor Landl. & Ten. § 626.

⁵ 3 Mod. 325; Wms. Exrs. 1753, 1759; 2 Saund. 181; 1 Lev. 127. As to the representative's liability for a ground rent, *cf.* Van Rensselaer v. Platner, 2 Johns. Cas. 17; Quain's Appeal, 22 Penn. St. 510. If the lease be assigned, the landlord, under such circumstances, may sue the lessee or assignee, or both jointly, at his option. Taylor Landl. & Ten. § 620.

accruing; though on an express stipulation for the payment of rent during the continuance of the lease, an action of covenant may, as we have seen, be brought.¹

Executors and administrators, though considered assignees in law of a term demised, may waive or incur an individual liability by their own acts. Thus, if the executor of a tenant from year to year omits to terminate the tenancy, and continues to occupy the premises from year to year, he becomes liable personally, as well as in his representative capacity, for the rent accruing during his occupancy.² Executors and administrators may not, however, be so charged with equal facility; for, it appears, that while an executor will be considered assignee of a term demised to his testator from the date of probate and qualification, an administrator only assumes such liabilities when he takes possession of the demised premises, or by other positive acts evinces his intention to become assignee in effect.³ But the personal representative cannot be charged personally as assignee, where he waives or surrenders the term. And this he should do in prudence, if the tenancy is unprofitable or threatens to involve him beyond the assets at his disposal. For, although an executor or administrator may be liable to respond to the covenants of a lease from the assets, he may at any time discharge himself from individual liability, by himself assigning

¹ Taylor Landl. & Ten. § 620; Wms. Exrs. 1752; Pitcher v. Tovey, 4 Mod. 71.

² Wollaston v. Hakewill, 3 M. & G. 297; Taylor Landl. & Ten. § 459. For, if the representative continues to occupy, and the landlord abstains from giving notice to quit, an implied promise to abide by the original terms is inferable. Wms. Exrs. 1761.

³ Pugsley v. Aikin, 11 N. Y. 494; Inches v. Dickinson, 2 Allen, 71. Even an unqualified person may by his entry incur the responsibility of an executor *de son tort*. Williams v. Heales, L. R. 1 C. P. 177; *supra*, Pt. II. c. 8; Tindal, C. J., in Wollaston v. Hakewill, 3 M. & G. 297, said, that, as to the argument that the executor, by being charged

generally as assignee, becomes thereby liable *de bonis propriis*, the answer is, that he may, by proper pleading, discharge himself from personal liability by alleging that he is not otherwise assignee than by being executor of the lessee, and that he has never entered or taken possession of the demised premises; and from all liability as executor, by alleging that the term is of no value, and that he has no assets. In other words, he should not take issue on the point whether he is assignee or not, for evidence that he is executor proves the affirmative. And see Green v. Listowell, 2 Ir. Law Rep. 384; Kearsley v. Oxley, 2 H. & C. 896.

over, if the landlord will not accept his surrender of the premises; since, like every other assignee, he is only liable personally for breaches of covenant happening during his own time, and not for those of his predecessors in enjoyment of the estate.¹ But, if he underlets, the occupation of the under-tenant is his occupation, and he becomes personally liable as assignee of the lease.²

§ 377. *Liability of Representative on Covenants concerning Real Estate, etc.* — It is laid down that if the purchaser of real estate dies without having paid down the purchase-money, his heir-at-law or devisee will be entitled to have the estate paid for by the executor or administrator, provided the personal assets suffice.³ And should the personal assets prove insufficient in such cases, so that the purchase cannot be carried out, the heir or devisee, as it appears, has an equity to require what personal assets may be obtained to be laid out in land for his benefit;⁴ not, however, we apprehend,

¹ *Remnant v. Bremridge*, 8 Taunt. 191; *Wms. Exrs.* 1758; 1 Kay & J. 575. Assignment over, even to a pauper, will discharge him as assignee; and in some cases, if the landlord will not accept a surrender of the lease, it is the representative's duty to thus prudently rid himself of the responsibility. 1 B. & P. 21; 4 My. & Cr. 1534.

² *Bull v. Sibbs*, 8 T. R. 327; *Carter v. Hammett*, 18 Barb. 608; *Taylor Landl. & Ten.* § 461. The estate of the lessee remains liable for rent in due course of administration if the landlord refuses to enter. *Martin v. Black*, 9 Paige, 641; *Copeland v. Stephens*, 1 B. & A. 593. As to declaring against executor or administrator as the assignee, see *Taylor Landl. & Ten.* § 461; *Wms. Exrs.* 1756. After entry the representative is charged for a breach either in his representative character or as assignee. *Ib.* The representative's personal liability for rent shall not exceed the value of the demised premises; though it is otherwise with respect of suing him as assignee on a covenant to

repair. 1 Bing. N. S. 89; *Taylor Landl. & Ten.* § 461; *Sleake v. Newman*, 12 C. B. N. s. 116. The rules and forms of pleading in such actions were quite technical and formal. Modern statute provisions are found relating to this subject. Thus, in English practice, an executor may sell the leaseholds and assign them to the purchaser, and afterwards, of his own authority, distribute the assets without making provision for future breach of covenant in the lease, and without being subject to any further liability. *Dodson v. Samuel*, 1 Dr. & Sm. 575; stat. 22 & 23 Vict. c. 35, § 27.

Specific performance on a covenant for renewal has been enforced against an executor who had entered and admitted assets. *Stephens v. Hotham*, 1 Kay & J. 571. But see *Phillips v. Everard*, 5 Sim. 102.

³ *Wms. Exrs.* 1762; 1 Sugd. V. & P. 180; *Whittaker v. Whittaker*, 4 Bro. C. C. 31; *Broome v. Monck*, 10 Ves. 597.

⁴ *Ib.*

to the injury of creditors of the decedent, but only so far as to establish him, where he was rightfully entitled to stand, with respect to the representative himself and the character of the decedent's property. If the purchase contract, on the other hand, was not, or should not have been completed, no equity attaches for the purpose of effecting a conversion of the property.¹ The rights, as between a personal representative and the heir of a deceased vendor, should be correspondingly treated.²

§ 378. **Liability of Representative on Joint or Several, etc., Contracts of Decedent.** — At common law, where there is a joint obligation or contract on one part, and one of the joint contractors or obligors dies, death puts an end to his liability, leaving the survivor or survivors thereto alone suable.³ But, on the other hand, where the contract or obligation was several, or joint and several, the personal representative of a deceased contractor or obligor may be sued at law in a separate action; not, however, jointly with the survivor, because the latter is liable, as an individual, but the former only so far as he may have assets;⁴ nor jointly with the representative of another deceased obligor or contractor, because each representative is answerable for assets of his own decedent estate, neither more nor less, according as they may suffice.⁵ The doctrine of survivorship, with its unequal rights and liabilities, is in modern times treated with disfavor; and local statutes are found whose scope is to make representatives liable to suit, on the assumption that the contract or obligation must have been not strictly a joint one, but joint and several, by intendment.⁶ Equity affords relief correspondingly, and asserts that contracts joint in form may, nevertheless, in a

¹ *Broome v. Monck*, 10 Ves. 597; *Curre v. Bowyer*, 5 Beav. 6. The court cannot speculate upon what the deceased party would or would not have done. *Ib.*

² *Wms. Exrs.* 1763; 1 Sugd. V. & P. 180.

³ *Wms. Exrs.* 1741; 1 Sid. 238; 4

Mod. 315; *Godson v. Good*, 6 Taunt. 594; 1 Chitty Pl. (16th Am. ed.) 58.

⁴ *May v. Woodward*, 1 Freem. 248; 1 Chitty Pl. 58.

⁵ *Grymes v. Pendleton*, 4 Call. 130.

⁶ See *Rice Appellant*, 7 Allen, 115; 124 Mass. 219; *Wms. Exrs.* 1740, Perkins's note; *Masten v. Blackwell*, 15 N. Y. Supr. 313.

correct interpretation of what the parties intended be taken to be joint and several,¹ though not so as to do violence to a mutual intention plainly inconsistent with that presumption.²

§ 379. **Liability of Representative of Deceased Partner.** — A partnership contract being joint in law, the rule of our preceding section applies to the case of a partnership debt; subject, however, to like statute qualifications,³ and similar remedies in equity. Thus, it is well settled that partners may be sued in equity on the assumption that the partnership debt is both joint and several; conformably to which theory the creditor may not only reach assets of a deceased partner in his representative's hands, should the surviving partner fail to satisfy his claim in full, but as the latter decisions hold, may pursue the assets of a deceased partner, as matter of preference, leaving the latter's representatives and the surviving partner to adjust their respective equities together.⁴

§ 380. **Liability of Representative of Deceased Stockholder.** — The personal liability of stockholders is usually defined specifically by the general or special act under which that corporation was created. A personal liability, beyond the value of one's own shares is not usually incurred, however, after the capital stock has been paid in; and whether the personal representative of a deceased shareholder should suffer stock to be lost to the estate, rather than pay assessments thereon, or assume corporate debts, is seen to be mainly a question of good faith.⁵ But, as to enforcing a personal liability on the part of the decedent, the doctrine

¹ Wms. Exrs. 1746; Primrose v. Bromley, 1 Atk. 90. And see Thorpe v. Jackson, 2 Y. & Coll. 533.

² Sumner v. Powell, 2 Meriv. 30; Rawstone v. Parr, 3 Russ. 424.

³ Sampson v. Shaw, 101 Mass. 145.

⁴ Liverpool Bank v. Walker, 4 De G. & J. 24; Vulliamy v. Noble, 3 Meriv. 619; 4 My. & Cr. 109; Devaynes v. Noble, 2 Russ. & My. 495; Wilkinson

v. Henderson, 1 My. & R. 582. See upon this subject more fully, Collyer Partn. §§ 576-580; Story Partn. § 362; 1 Story Eq. Jur. § 676; Wms. Exrs. 1743, 1744, and cases cited. The adjustment or winding-up of partnership affairs belongs to equity courts. As to winding up a trade with the surviving partner, see *supra*, § 325.

⁵ *Supra*, § 318.

of the English equity courts is, that the executor or administrator of a deceased shareholder succeeds presumably to the full liability, as well as to the rights of the latter, such as they may be ; and even that for liabilities incurred in respect of the shares since the death of the shareholder, the representative must respond out of the assets.¹ The American doctrine, so far as developed, pursues apparently the same doctrine, to at least the extent that executors and administrators of deceased shareholders become liable *prima facie* in their representative capacity, as for other debts of the deceased.²

Hence, assets of the estate of the deceased shareholder may be reached in equity in order to enforce contribution among shareholders for losses sustained by the company ; and this after a procedure analogous to that which obtains in adjusting partnership profits and losses.³ But, even where stockholders are made liable by the incorporating act beyond the value of their respective shares, for debts of the corporation, it is not unfrequently provided that the execution shall issue against the corporation, and be returned unsatisfied before shareholders can be thus held jointly and severally liable for the debts ;⁴ and corporate debts are usually to be enforced directly against the corporation, whose capital stock, represented by the certificates of shares, and invested in the corporate business, is the proper and primary fund from which all such liabilities should be made good.

It is held in England that the personal representative who accepts new shares of a corporation should be put on the books in his individual and not his representative character, and be held personally liable in respect of them.⁵

¹ Baird's Case, L. R. 5 Ch. 725, and cases cited. The charter or act of incorporation must be examined to see whether the liability is made less.

² Grew v. Breed, 10 Met. 679, *contra*, Ripley v. Sampson, 10 Pick. 371 ; New England Bank v. Stockholders, 6 R. I. 154.

³ Cases, *supra* ; Bulmer's Case, 33 Beav. 435.

⁴ Cutright v. Stanford, 81 Ill. 240. And see Thompson on Stockholders, §§ 250-254.

⁵ Leeds Banking Co., *Re*, L. R. 1 Ch. 231. Turner, L. J., put the case in similar to that of an executor's carrying on a trade with assets. But the rules as to permitting a trust investment in stock are not the same in England as in most of the United States. See *supra*, § 323.

§ 381. **Exoneration of Personal Property specifically bequeathed.**—Where, by the terms of a will, chattels are specifically bequeathed, such as a diamond ring, a silver cup, or a stock of wines, it is to be presumed that the intention was to bequeath them by an unencumbered title; and hence, if at the testator's death the ring or cup be found pawned, or the wines prove to be on storage or in some government warehouse liable to customs duties, the executor should redeem or exonerate the thing at the expense of the estate, and deliver it, free of charge, to the legatee.¹

But the just intention of the testator, as manifested by the will, should prevail in all such cases where this presumption is overcome. Nor is a thing specifically bequeathed, unless the will so prescribes, to be put, at the cost of the estate, in better condition than the testator left it; but the legatee must take it for better or worse, just as the testator might have handed it over on his death. Stock specifically bequeathed is bequeathed as with a clear title; but so as to relieve the estate, nevertheless, from the whole burden of further assessments, as well as to deprive it of the benefit of subsequent dividends.² For, the rule is, that the bequest is taken by the legatee with all the incidental advantages and disadvantages of dominion, unless the will should, as it may, speak differently.³ If the thing had ceased to exist at the testator's death, or if no title could, under the circumstances, devolve upon his personal representative, the bequest would prove of no avail, for the estate would not be bound to supply an equivalent.⁴ All this is presumed to be in accordance with what a testator intended by his specific bequest, and conforms to general doctrines applicable to title derived under a will.

¹ Knight *v.* Davis, 3 My. & K. 358; Stewart *v.* Denton, 4 Dougl. 219. So, too, we may suppose, if the thing specifically bequeathed had been placed on storage by the decedent or left to be mended.

² Armstrong *v.* Burnet, 20 Beav. 424;

Day *v.* Day, 1 Dr. & Sm. 261; Addams *v.* Ferick, 26 Beav. 384.

³ Wms. Exrs. 1764, commenting upon Marshall *v.* Holloway, 5 Sim. 196, where a leasehold interest was specifically bequeathed; Hickling *v.* Boyer, 3 Mac. & G. 635.

⁴ See *c. post* as to specific legacies.

§ 382. **Liability of Personal Representative in Respect of his Own Acts; Negligence or Bad Faith, etc.**—*Second.* To dwell now more especially upon the liability which a personal representative incurs in respect of his own acts while administering the estate. The course of investigation in former chapters has shown us that every executor or administrator is bound to observe not only good faith, but a certain degree of care and diligence, properly estimated according to the circumstance of serving with or without compensation, and fixed at “ordinary” in the one instance and “slight” in the other. For losses occasioned by his gross negligence or wilful default he is, therefore, personally liable; and usually, too, in the United States (since here the personal representative is, as a fiduciary, entitled to compensation), for all ill consequences suffered by the estate through his failure to bestow ordinary care and diligence.¹ For losses occasioned through his bad faith, too, the representative is personally liable.² Furthermore, an executor or administrator is bound to perform his whole duty according as the law or his testator’s will may have directed; and he cannot, after accepting the trust, avoid any of the responsibilities which properly attach to the office.³

§ 383. **Common-Law Doctrine as to Devastavit or Waste.**—This standard of liability is that adopted by courts of equity and probate in concurrence with the common sense of mankind. But the common law appears to have pursued a somewhat different theory in dealing with such matters; an odd and, indeed, an illiberal one.⁴ In equity and probate practice, at the present day, the executor or administrator becomes bound to account for his proceedings under his trust, and allowance or disallowance of items and transactions is made upon the just maxims of responsibility which we have stated.⁵ But the common law long recognized direct remedies against the personal representative, founded upon the suggestion of a *devastavit* on his part.⁶

¹ *Supra*, §§ 313–315.

² *Ib.*

³ *Booth v. Booth*, 1 Beav. 125; *Jacob*, 198; *Williams v. Nixon*, 2 Beav. 472.

⁴ *Supra*, § 315.

⁵ See *post* as to accounts, etc.

⁶ *Wms. Exrs.* 1985; appendix, *post*.

A violation of duty, by the executor or administrator, such as renders him personally responsible for mischievous consequences, the law styles a *devastavit*; that is, a wasting of the assets; or, to take the definition of the courts, a mismanagement of the estate and effects of the deceased, in squandering and misapplying the assets contrary to the duty imposed on him. For a *devastavit*, the executor or administrator, it is said, must answer out of his own means, so far as he had or might have had assets of the deceased.¹

§ 384. **The Essential Principle of Devastavit is of General Application.**—The essential principle at the basis of this rule of *devastavit* operates, doubtless, whenever and wherever the personal representative should personally respond for his official conduct; and whether the maladministration be wanton, wilful, and fraudulent on his part, or founded in inexcusable carelessness, and whether the misconduct be active or passive, so long as those interested in the assets suffer thereby.² How wide the scope of this doctrine, we have already seen, while investigating the general rights and powers of the personal representative. We shall see its further application hereafter, when we come to consider the payment of debts and claims against the estate, the satisfaction of legacies, and the transfer or distribution of the final residue; when we observe the performance of his official duties under peculiar aspects, as where the estate is insolvent, or when it becomes needful and proper for him to take the charge of his decedent's real estate or sell it; with reference to the duty of accounting, as well as obeying the mandates of a court; and, in short, throughout the entire administration

¹ Bac. Abr. Exors. L. 1; Wms. Exrs. 1796.

² Executors and administrators may be guilty of a *devastavit*, not only by a direct abuse by them, as by spending or consuming, or converting to their own use the effects of the deceased, but also by such acts of negligence and wrong administration as will disappoint the claimants on the assets. Bac. Abr. Exors. L. Among examples of the for-

mer kind, a collusive sale or pledge of the assets may be cited. Of the latter kind, numerous instances have already been mentioned; and Williams specifies particularly, paying too much for the funeral, paying debts out of order to the prejudice of those of higher rank, and assenting to the payment of a legacy when there is not a fund sufficient for creditors. Wms. Exrs. 1797.

of the estate, and so long as he pursues the official trust reposed in him. And what is thus observable of a sole original executor or administrator invested with plenary authority, will be found to hold true, *mutatis mutandis*, in the qualified trusts to be hereafter specially considered, as where the appointment is not original and complete, or where two or more serve together in the office. For we here apply a broad principle which pervades the whole law of bailments and trusts, and underlies the performance of duty by officers public or private. Official responsibility, in a word, involves, in any station of life, the performance of one's duty: first, honestly and uprightly, and next, with the exercise of a reasonable degree of care and diligence, according to circumstances, the nature of the trust imposed, and the limitations of authority prescribed by law.¹

§ 385. **Representative not to be sued in such Capacity for his own Wrongful Act; Qualifications of the Rule.**—An executor or administrator cannot be sued in his representative character, for his own wrongful act committed, so as to inflict personal injury upon another, while administering the estate. For, if liable at all, the act is outside the scope of his official authority, and he must be sued and held responsible as an individual.² But, in some instances, where the gist of the offence consists in a continuing wrongful detention of the plaintiff's goods, the wrong having really originated with the decedent, a suit may be brought, if the plaintiff so elect, against the executor or administrator in his representative capacity.³ Statute directions on such points seem desirable;

¹ It has been observed by equity courts that two principles influence their course, with respect to the personal liability of executors and administrators for their official conduct: (1) That in order not to deter persons from undertaking these offices, the court is extremely liberal in making every possible allowance, and cautious not to hold executors or administrators liable upon slight grounds. (2) That care must be taken to guard against an abuse of their

trust. *Powell v. Evans*, 5 Ves. 843; *Tebbs v. Carpenter*, 1 Madd. 298; *Raphael v. Boehm*, 13 Ves. 410. As to imputation of waste from one's neglect to file an inventory, see *Orr v. Kaines*, 2 Ves. Sen. 193. And as to accounting, see Part VII. *post*.

² *Boston Packing Co. v. Stevens*, 12 Fed. Rep. 279; *Thompson v. White*, 45 Me. 445.

³ Trover will lie against the representative personally, for a conversion

for the old common law is not explicit enough, and its theory, that the right of action dies with the offender, has been discarded to a great extent by modern legislatures.¹

§ 386. **Instances of Devastavit considered; Effect of an Arbitration or Compromise of Demands.** — Only a few special instances of liability for *devastavit* or waste, at the common law, need here be specially considered; for the general doctrine is sufficiently applied under appropriate heads in other chapters.

At common law, the arbitration, compromise, or release of a debt or claim due the estate, was regarded as a waste on the part of the personal representative, if it resulted in loss to the estate. Concerning arbitration, the point appears to have been stated in the old books quite sternly;² as to compromise, however, later qualifications were admitted, which in good reason apply to either act, which the court of chancery saw fit to insist upon, and which, as to either compromise or arbitration, are now usually insisted upon. The

by him, though the property came to him with the estate of his decedent. *Walter v. Miller*, 1 Harr. (Del.) 7. And see *Denny v. Booker*, 2 Bibb. 427; *Thompson v. White*, 45 Me. 445; *Clapp v. Walters*, 2 Tex. 130; *supra*, § 372. In some instances an action for money had and received may be more appropriate. See *Farrelly v. Ladd*, 10 Allen, 127. For the misapplied balance of a fund, entrusted to him by a debtor of the estate, for discharging the debt thus owing, the personal representative is liable, not in his official, but in his individual, character; and for such balance the debtor may sue as for money received by the defendant to the plaintiff's use. *Cronan v. Cutting*, 99 Mass. 334.

Trover lies, under the statutes of some States, against an executor or administrator in such capacity, for a conversion, as, *e.g.*, of bonds and mortgages, by his testate or intestate. *Terhune v. Bray*, 16 N. J. L. 54. And it is proper to treat such things as personal prop-

erty, whatever may have been the earlier rule. *Cf. Chaplin v. Burett*, 12 Rich. 284.

"The principles adopted seem to be that, where the deceased, by a tortious act, acquired the property of the plaintiff, as by cutting his trees and converting them to his own use, or by converting his goods to his own use; although no action of trover or trespass will lie; yet the law will give the plaintiff some form of action to recover the property thus tortiously obtained." Putnam, J., in *Cravath v. Plympton*, 13 Mass. 454.

¹ See *supra*, § 373.

² If the executor submits a debt due to the testator to arbitration, and the arbitrators award him less than his due; this, being his own voluntary act, shall bind him, and he shall answer for the full value as assets. *Wentw. Off. Ex.* 304, 14th ed.; 3 Leon. 53; *Bac. Abr. Exors. L.*; 1 *Ld. Raym.* 363, by Holt, C. J. And see *Reitzell v. Miller*, 25 Ill. 67; *Yarborough v. Leggett*, 14 Tex. 677; *Nelson v. Cornwell*, 11 Gratt. 724.

executor or administrator who compromised a debt, so as to receive less than its full amount, was still held answerable for the whole; and yet, if he could show, in exculpation, that he acted therein for the benefit of the estate, he stood excused.¹ The universal test for modern times should be, whether, in compromising or submitting to arbitration, the representative acted with fidelity and due prudence;² but not to leave the doctrine uncertain on this point, recent express legislation, both in England and the United States, greatly enlarges the powers of executors and administrators to compound and refer claims and demands to arbitration at their own discretion, clothing probate tribunals in numerous instances with express jurisdiction to authorize such acts on their part, and thereby afford the representative a more adequate immunity.

§ 387. **Compromise or Arbitration of Claims; Modern Statutes.** — As a fair, speedy, and inexpensive means, therefore, of adjusting doubtful claims against an estate and relieving the legal representative from undue responsibility, our modern legislation permits of compromise and arbitration; one or other of which causes is frequently preferred on both sides to an uncertain law suit. Thus, the English statute 23 and 24 Vict. c. 145, authorizes executors to compound and refer to arbitration, “without being responsible for any loss to be occasioned thereby.”³ And by legislative enactments in most of the United States, differing somewhat in detail, executors and administrators are empowered to adjust by arbitration, and compromise any demands in favor of or against the estates represented by them under previous authority of the probate court.⁴ This statute authority in some States, however, does not embrace claims against the estate, but only

¹ Wms. Exrs. 1800; *Blue v. Marshall*, 3 P. Wms. 381; *Pennington v. Healey*, 1 Cr. & My. 402.

² See *Coffin v. Cottle*, 4 Pick. 454; *Chadbourn v. Chadbourn*, 9 Allen, 173; *Eaton v. Cole*, 1 Fairf. 137; *Kendall v. Bates*, 35 Me. 357.

³ 23 & 24 Vict. c. 145, §§ 30, 34; Wms. Exrs. 1801.

⁴ Mass. Gen. Stats. c. 101, § 10; *Woodin v. Bayley*, 13 Wend. 453; *Tracy v. Suydam*, 30 Barb. 110; *Peter's Appeal*, 38 Penn. St. 239.

those in its favor, or *vice versa*; nor is the statutory right to arbitrate treated always on the precise footing as that of compromising claims.¹ And, again, as under the English statute above cited, the right conferred by the legislature does not appear always to contemplate the direct intervention of the probate court.²

¹ Reitzell v. Miller, 25 Ill. 67.

² Kendall v. Bates, 35 Me. 357; Childs v. Updyke, 9 Ohio St. 333. Arbitration is not in Texas a proper mode to establish a rejected claim. Yarborough v. Leggett, 14 Tex. 677. But as to the general reference of disallowed claims, see McDaniels v. McDaniels, 40 Vt. 340. See also Ponce v. Wiley, 62 Ga. 118; U. S. Digest, 1st Series, Executors and Administrators, 2057-2080. The practitioner should consult the local code on this subject, and local decisions construing its provisions. Under the New York code a claim for a tort—*e.g.*, the conversion of personal property—is thus referable. Brockett v. Bush, 18 Abb. Pr. 337. But only claims which accrued or would have accrued during life. 17 Abb. N. Y. Pr. 374; *cf.* McDaniels v. McDaniels, 40 Vt. 340. And see the Maryland statute which does not apply to claims binding the executor or administrator personally. Browne v. Preston, 38 Md. 373.

Such statutes, being for a convenient and expeditious settlement of the estate, do not sanction a composition deed giving a long term of payment. Loper, Matter of, 2 Redf. (N. Y.) 545.

The effect of all such legislation is mainly to sanction a course of proceeding on the part of an executor or administrator, formerly open to him, though at a greater personal peril. At the common law an executor or administrator might compound or release a debt due the estate, or arbitrate, if he could afterwards show that his act was beneficial to the estate; but if the arbitrators awarded less than was due the estate, or the compromise turned out

ill, he might have to suffer personally as for waste; for, objection being made by parties interested under the administration, he had the onus of proving that he had acted judiciously and that the estate had not suffered in consequence. Wms. Exrs. 1799, 1800, and cases cited; 1 Ld. Raym. 369, by Holt, C. J.; Wiles v. Gresham, 5 De G. M. & G. 770; Blue v. Marshall, 3 P. Wms. 381; Nelson v. Cornwell, 11 Gratt. 724; Boyd v. Oglesby, 23 Gratt. 674; Davenport v. Congregational Society, 33 Wis. 387; Alexander v. Kelso, 59 Tenn. 311. A statute which expressly extends the power to submit claims against the estate to arbitration may yet leave claims against the estate to be adjusted as at common law. Wood v. Tunnicliff, 74 N. Y. 38; Geiger v. Kaigler, 9 S. C. 401. As to binding the representative personally by the award, see Wood v. Tunnicliff, *supra*. By procuring previous authority from the probate court, however, as some of these statutes now provide, and by pursuing its terms, the good faith of the executor or administrator is sufficient warrant that the arbitration or compromise will stand; and to relieve him from personal liability for ensuing consequences is, we may assume, the general purpose of all such legislation, even where such permission from the probate court is not contemplated. Wyman's Appeal, 13 N. H. 18, 20, *per* Parker, C. J.; Chadbourn v. Chadbourn, 9 Allen, 173; Chouteau v. Suydam, 21 N. Y. 179. If a party in interest means to attack a particular compromise obtained under probate sanction, as for fraud, he should bring a bill in equity or proceed specially. Henry County v. Taylor, 36 Iowa, 259. See, *e.g.*, language of stat.

This right of arbitration or compromise is extended by local legislation to other instances, and for sundry express purposes. Thus, in Massachusetts and various other States, arbitrators may be appointed to determine the validity of a claim against an insolvent's estate;¹ or, in case of dispute, the executor's or administrator's personal claim upon the deceased.² And it is also provided in Massachusetts that the supreme court may authorize executors or administrators to adjust, by arbitration or compromise, controversies arising between different claimants to the estates in their hands; and further provision is made for compromising suits which involve the validity of a will.³

§ 388. **Release of Debt, Renewals, etc., by the Executor or Administrator.** — English authorities establish that at the old law, if the legal representative releases a debt due the decedent, or delivers up or cancels a bond in which the deceased was named obligee, or takes a new obligation expressed to himself personally, or settles a suit upon consideration, he shall be, *prima facie* at least, chargeable as for a *devastavit*, for the full consideration, on the theory that unless he can produce such consideration in full, he must have wasted it to the disadvantage of the estate.⁴ Ordinarily, a representative is not called upon to forgive or release a debt or claim to which he knows the estate was entitled, without receiving some consideration; and if he does so gratuitously and to the detriment of the estate, he is liable as for *devastavit*, even though he acted with honest purpose.⁵

But modern statutes lessen the liability for releases given upon sundry considerations of convenience to the estate, in

23 & 24 Vict. c. 145, § 30, cited *supra*.

The general right of an executor or administrator to arbitrate or compromise appears deducible from the right or duty of prosecuting or defending suits which involve the interests of the estate he represents.

¹ *Gilmore v. Hubbard*, 12 Cush. 220; *Green v. Creighton*, 7 Sm. & M. 197.

² Mass. Public Stats. c. 136, § 6.

³ Mass. Pub. Stats. c. 142, §§ 13-16.

⁴ *Wms. Exrs.* 1799, 1800; *Cro. Eliz.* 43; 1 *Ld. Raym.* 368; 1 *Freem.* 442.

⁵ *People v. Pleas*, 2 *Johns. Cas.* 376. It is held that the representative exceeds his proper functions when he enters into an agreement with the debtors of an estate to extend the time of payment beyond that fixed by the original contract. *Landry v. Delas*, 25 *La. Ann.* 181.

various prescribed instances, on the analogy of a compromise. Thus, in some States, probate courts or the supreme court, may now authorize executors or administrators to release and discharge, upon such terms and conditions as may appear proper, any vested, contingent or possible right or interest belonging to the persons or estates represented by them, in property real or personal, whenever it appears for the benefit of such persons or estates.¹

§ 389. **Disregarding the Bar of Limitations; General and Special Statutes of Limitations.**—To proceed with instances of *devastavit*. The rule has been laid down in England and the United States, that it is not *devastavit* in the personal representative to pay a just debt, although that debt be barred by limitations, and that he is not bound to plead the statute when sued by a creditor. This, however, was first promulgated as the equity view;² for courts of common law appear to have once inclined to hold to the contrary;³ while chancery left it rather to the personal representative to satisfy, at his own discretion, the conscience of his decedent. The English courts of equity will neither compel the personal representative, when sued by a creditor, to plead the statute bar in favor of the residuary legatee or distributee, nor suffer such party to set it up by virtue of his right to the surplus, unless proceedings with reference to the estate are in such a form that he is essentially a party to the suit, and can take this advantage without interference.⁴ In the United States

¹ Mass. Gen. Stat. c. 101, § 11. See *supra*, § 306, as to renewals, etc.

In sanctioning arrangements between parties disputing a will, chancery *semble* does not intend to bind infants or other parties not *sui juris*. *Norman v. Strains*, 29 W. R. 744.

A release may involve a *devastavit*, and yet not be null and void. See *Davenport v. Congregational Society*, 33 Wis. 387.

² *Norton v. Frecker*, 1 Atk. 526; *Stahlschmidt v. Lett*, 1 Sm. & G. 415; *Wms. Exrs.* 1803. Notwithstanding the personal estate is insufficient for the

debt, and the effect will be to throw the burden upon the real estate, the representative is not obliged to plead the statute. *Lewis v. Rumney*, L. R. 4 Eq. 451. In this last-mentioned case, Lord Romilly, M. R., expressed his regret that the statute did not destroy the debt instead of taking away the remedy for it, and thus leaving questions of discretion so perplexing to arise.

³ See *McCulloch v. Dawes*, 9 Dow. & Ry. 43, disapproved in *Hill v. Walker*, 4 Kay & J. 166; *Lewis v. Rumney*, L. R. 4 Eq. 451.

⁴ *Shewen v. Vandenhurst*, 1 Russ. &

the general rule is that of the English chancery; and the executor or administrator is permitted to satisfy the barred debt, and need not plead the statute of limitations.¹ Local codes to a certain extent, however, regulate this subject; and the rule in some States appears to be that the personal representative can only exercise his discretion where the statute of limitations operates after his appointment, or perhaps since the decedent's death; and that debts, barred while the decedent was alive, he cannot assume the power to pay.²

In England and some parts of the United States, it is held that an acknowledgment of the decedent's debt by the personal representative will take the case out the statute.³ But the rule most consistent with the policy of American legislation is, that an acknowledgment by the representative does not remove the statute bar after it has once operated on the debt, although it may suffice to suspend its operation if made before the bar is complete.⁴ In any event, there should be

My. 347; 2 Russ. & My. 75; Wms. Exrs. 1804; *Briggs v. Wilson*, 5 De G. M. & G. 12. After a decree has been obtained in equity, an interested party may thus take advantage of the decree and set up the statute. *Briggs v. Wilson*, *supra*.

¹ *Fairfax v. Fairfax*, 2 Cranch, 25; *Wood Limitations*, § 188; *Scott v. Hancock*, 13 Mass. 162; *Hodgdon v. White*, 11 N. H. 208; *Thayer v. Hollis*, 3 Met. 369; *Ritter's Appeal*, 23 Penn. St. 95; *Pollard v. Sears*, 28 Ala. 484; *Miller v. Dorsey*, 9 Md. 317; *Payne v. Pusey*, 8 Bush, 564; *Walter v. Radcliffe*, 2 Desau. 577; *Batson v. Murrell*, 10 Humph. 301.

² See *Patterson v. Cobb*, 4 Fla. 481; *Rector v. Conway*, 20 Ark. 79. But the English rule is to the contrary, recognizing no such distinction. *Hill v. Walker*, 4 K. & G. 166. A testator may expressly direct his executor to disregard the statute of limitations. *Campbell v. Shoatwell*, 51 Tex. 27.

Among other proceedings in equity which constitute an exception to the rule that the executor or administrator alone

shall exercise the option of pleading the statute, is that of bringing a bill to charge the real estate of the deceased with the payment of debts due from the estate; and where this method is pursued, the heir or a devisee, residuary legatee, or other person in interest, is so brought into the suit that the statute may be interposed by him. *Wood Limitations*, § 188; *Partridge v. Mitchell*, 3 Edw. Ch. 180; *Warren v. Poff*, 4 Bradf. 260. And see *Woodyard v. Polsley*, 14 W. Va. 211.

The representative may with propriety pay a debt due to himself from the estate upon which the statute has run. *Payne v. Pusey*, 8 Bush, 564.

³ *Briggs v. Wilson*, 5 De G. M. & G. 12; *Browning v. Paris*, 5 M. & W. 120; *Temmes v. Magruder*, 10 Md. 242; *Northcut v. Wilkins*, 12 B. Mon. 408; *Brewster v. Brewster*, 52 N. H. 52; *Shreve v. Joyce*, 36 N. J. L. 44; *Wood Limitations*, § 190.

⁴ *Wood Limitations*, § 190, and cases cited; *Forney v. Benedict*, 5 Penn. St. 225; *Foster v. Starkey*, 12 Cush. 324; *McLaren v. McMartin*, 39 N. Y. 38.

not only a new promise by the executor or administrator in order to charge the estate, but a promise made by him in his representative capacity;¹ though equity corrects the common-law tendency to exclude such acknowledgments, by admitting that as a good acknowledgment on the representative's part which would have been good if made by the original debtor.²

§ 390. **General and Special Statutes of Limitation; the Subject continued.**—While, however, the general statute of limitations may be disregarded, it is held waste not to plead the special bar which our modern local legislation sets to demands against the estates of deceased persons.³ In most of our States, indeed, express provision is now made that claims against an estate shall be presented within a certain time after the death of the debtor or the appointment of his executor or administrator, or be forever barred; and the reason of such legislation being sound, and the language of the enactment explicit, the personal representative is bound to comply with the requirement.⁴ Creditors themselves are thus put upon the alert; and their own want of vigilance cannot protect their claims against the statute barrier, where they have relied upon the representative, and forborne to sue at his request.⁵

As to acknowledgment by only one of two or more executors, *cf.* *Scholey v. Walton*, 12 M. & W. 514; *Shreve v. Joyce*, 36 N. J. L. 44.

¹ *Scholey v. Walton*, 12 M. & W. 510; *Atkins v. Tredgold*, 2 B. & C. 28.

² *Cf.* *Briggs v. Wilson*, 5 De G. M. & G. 12; *Tullock v. Dunn*, Ry. & Moo. 416.

³ *Thompson v. Brown*, 16 Mass. 172; *Heath v. Wells*, 5 Pick. 140; *Langham v. Baker*, 5 Baxt. 701.

⁴ *Ib.* And see U. S. Dig. 1st series, Exrs. & Adms. 4472; *Wood Limitations*, § 188, and numerous cases cited; payment of debts, *c. post*; *Ticknor v. Harris*, 14 N. H. 272; *Harter v. Taggart*, 14 Ohio St. 122.

⁵ *Ib.* And see *Langham v. Baker*, 5 Baxt. 701. Unless the statute gives the court power to excuse delay, reasons why the creditor neglected to present his demand in due time cannot be considered. *Sandford v. Wicks*, 3 Ala. 369. It is held, as to various statutes of this character, that strictly equitable claims as mortgages are not included. *Bradley v. Norris*, 3 Vt. 369; *McMurrey v. Hopper*, 43 Penn. St. 468; *Fisher v. Mossman*, 11 Ohio St. 42; *Allen v. Moer*, 16 Iowa, 307. Nor claims for the recovery of specific property. *Andrews v. Huckabee*, 30 Ala. 143. Or to compel the application of trust property to the payment of the debt which it was held in trust to secure. *Stark v.*

How far an executor or administrator is at liberty to revive debts or claims against the estate he represents, which are already barred, is not clearly determined. In most cases, the circumstance of his doing so is to be attributed, apparently, to the conscientious exercise of that option which we have seen is now so generally conceded to him.¹ But if he goes beyond the line of legislative and judicial sanction, and pays an outlawed debt corruptly or in violation of the duty he owed as personal representative of the estate, he may become liable personally as for *devastavit*.² Equity will, under special circumstances of hardship, though not usually, furnish relief to a party whose claims against an estate cannot be enforced at law, by reason of his failure to comply with the requirement of a statute limiting the time of presenting and suing on the same;³ nor are express reservations of this character absent from such local legislation.

Hunton, 3 N. J. Eq. 300; Pope v. Boyd, 22 Ark. 535. Nor claims originating after the period named. Griswold v. Bigelow, 6 Conn. 258. Nor claims in the orphans' court. Yingling v. Hesson, 16 Md. 112. Nor so as to debar the creditor from making a set-off when sued. Lay v. Mechanics' Bank, 61 Mo. 72. And see Neil v. Cunningham, 2 Port. 271; Wood Limitations, § 189, and cases cited.

Such statutes properly reckon the period from the date of the representative's appointment; for the running of such a period between the decedent's death and the qualification of his executor or administrator would work injustice to the creditor. 33 Ark. 141.

The recovery of a claim against the estate of a deceased person, which originates after, or from its nature cannot be ascertained within the time limited by the court for the exhibition of claims, is not barred by its non-exhibition within that time. Griswold v. Bigelow, 6 Conn. 258; Hawley v. Botsford, 27 Conn. 80; Chambers v. Smith, 23 Mo. 174. And where such claim has been duly exhibited to the representative, and its pay-

ment refused, the natural and proper remedy (in the absence of explicit legislative provision) is to bring an action at law against the representative. Bacon v. Thorp, 27 Conn. 251. As to the representative's individual liability in such cases, see Oates v. Lilly, 84 N. C. 643; McGrath v. Barnes, 13 S. C. 328.

¹ *Supra*, same section.

² Where, for instance, he pays a debt in violation of the special statute barrier imposed upon executors and administrators. See *supra*, same section. If one sets up the bar of limitations, he must make and sustain such defence with due diligence and good faith. Teague v. Corbitt, 57 Ala. 529.

³ McCormack v. Cook, 11 Iowa, 267; Stromo v. Bissel, 20 Iowa, 68; Clifton v. Haig, 4 Desau. 330.

With reference to a creditor against the estate, the rule, irrespective of statute qualifications, appears to be this: death of the debtor does not suspend the running of the statute where the cause of action accrued before his death; but where the cause of action accrues after his death, the statute does not begin to run until an executor or adminis-

§ 391. **The Subject continued.**—Whenever the statute of limitations has begun to run against a debt or claim due the estate before the death of the decedent, although upon the very day of his death, the statute bar will operate, notwithstanding the personal representative sues for it within a reasonable time afterwards.¹ In several States, however, this hardship is corrected by express enactment.² Where, too, the statute has begun to run upon the decedent's debt or claim during his life, it is not suspended by his death, although no representative has been appointed.³ This hardship, once more, some State legislatures have removed.⁴ As for a debt or claim, however, against which the statute had not commenced to run during the creditor's or claimant's life, it will not begin to run against his estate until the executor's or administrator's appointment and qualification; and this upon the principle that there was no person capable of suing for it.⁵ This, once more, is a rule subject to the manifest direction of the legislature upon a construction of local statutes. An acknowledgment or partial payment made to the executor or administrator by a debtor to the estate will take the debt out of the statute of limitations.⁶

The rule of equity appears to be the same as that of law as to the running of the statute bar against claims due the estate; but the executor or administrator cannot, by deferring probate, take personal advantage of a debt owing from himself to the estate he represents; and in various cases of

trator is qualified, inasmuch as the creditor meanwhile has found no one whom he could sue; and where the cause of action arises on a contract, etc., by the representative himself, the statute begins to run from the time such cause of action accrued.

¹ Penny v. Brice, 18 C. B. N. S. 393.

² Wood Limitations, §§ 193, 196.

³ Davis v. Garr, 6 N. Y. 124; Burnett v. Brian, 6 N. J. L. 377; Hall v. Deatly, 7 Bush, 687; Baker v. Brown, 18 Ill. 91; Jackson v. Hitt, 12 Vt. 285; Wood Limitations, § 194.

⁴ Wood Limitations, § 196, and appendix. A certain period is usually

allowed the representative, after his appointment, to bring suit by local enactments.

⁵ Burdick v. Garrick, L. R. 5 Ch. 233; Clark v. Hardman, 2 Leigh, 347; Andrews v. Hartford R., 34 Conn. 57; Sherman v. Western R., 24 Iowa, 515; Wood Limitations, § 194, where this doctrine is discussed with reference to statute actions by the executor or administrator for causing the death of his testate or intestate.

⁶ Martin v. Williams, 17 Johns. 330; Jones v. Moore, 5 Binn. 573. And see Townsend v. Ingersoll, 12 Abb. Pr. (N. Y.) N. S. 354.

fraud or mistake, equity makes an exception to the general rule, that where time has begun to run in the decedent's lifetime it shall not be suspended between the date of his death and the date when the representative qualifies.¹

It still remains a subject for judicial decision as to how far an executor or administrator becomes liable personally as for a *devastavit*, if he allows time to run in favor of a debtor and against the estate he represents; but it would appear that, for culpable neglect or bad faith on his part producing this result, he may be held personally liable.²

§ 392. **Instances of Devastavit continued; disregarding the Statute of Frauds.**—While the bar of limitations may thus be disregarded, in the case of demands once binding, an executor or administrator exercises no such option as to debts or claims which never had a binding force, since the law invests him with no authority on the decedent's behalf to dispense favors or perform obligations simply moral. Hence, he cannot pay a debt that accrued under a contract that is void because within the statute of frauds; and, if he does so, he is chargeable with *devastavit*; though the promise may be said to create a personal liability on his part.³

§ 393. **Devastavit when excused by Concurrence, Acquiescence, etc., of those injured thereby.**—The concurrence or acquiescence of those injuriously affected by the *devastavit* of an executor or administrator will, agreeably to general maxims, release the latter party from further responsibility for the injurious act or transaction; and so, doubtless, their release or acquittance as for satisfaction and indemnity rendered by a mutual private arrangement. But a court of equity or probate is at liberty to inquire into all the circumstances which induced such action on their part, and ascertain whether their conduct really amounts to such sanction,

¹ Wood Limitations, § 199; Brooks-bank v. Smith, 2 Y. & C. 58; Ingle v. Richards, 28 Beav. 366; Barfield v. King, 29 Ga. 288.

² 12 Mod. 573; Wood Limitations, § 197.

³ Baker v. Fuller, 69 Me. 152.

ratification, or acquittance as ought justly to relieve the representative from further liability.¹

§ 394. **Complicity of third Persons in the Devastavit renders them liable.**—Whenever an executor or administrator violates his trust, and another person takes advantage of the *devastavit*, knowing that the personal representative is not proceeding according to the requirements of the law, or the terms of the will under which he was appointed, such complicity will authorize those interested in the estate to hold such third party liable.²

§ 395. **Liability of Executor or Administrator on his own Contracts.**—The liability of an executor or administrator, in respect of his own contracts touching the estate, may be gathered in a measure from our previous discussion of his rights.³ The former inclination appears to have been to charge the executor or administrator strictly as an individual, and not in his representative capacity, where the promise was alleged to have been made by him after the death of the person whose estate he represented. In general, where the claim or demand wholly accrued in his own time, the representative was to be held personally liable alone.⁴ And some decisions still countenance the doctrine that no action at law will lie against an executor or administrator, as such, except upon some claim which originated against the testator or intestate during his lifetime, notwithstanding the contract sued upon was made by him for the benefit of the estate.⁵

But, according to the weight of modern authorities, the executor or administrator is liable upon such promise, in his representative, as well as his personal capacity, where the claim or demand accrues in his own time,⁶ provided that which con-

¹ *Burrows v. Walls*, 5 De G. M. & G. 233; *Wms. Exrs.* 1836; 25 Beav. 177, 236. *nings v. Newman*, 4 T. R. 348; *Cocke v. Trotter*, 10 Yerg. 213; *Adams v. Adams*, 16 Vt. 228; *Beaty v. Gingles*, 8 Jones L. 302.

² *Rogers v. Fort*, 19 Ga. 94. And see *supra* as to sales, § 359.

³ *Supra*, § 290.

⁴ *Wms. Exrs.* 1771; *Cro. Eliz.* 91; *Hawkes v. Saunders*, *Cowp.* 289; *Jen-*

⁵ See *De Valengin v. Duffy*, 14 Pet. 282, *per* Taney, C. J.

⁶ *Ib.*

stituted the consideration of the promise, or the cause of action, arose in the lifetime of the decedent.¹ Where assets are deficient, a reliance upon the individual liability of a wealthy representative may be advantageous for the creditor; but the reverse is sometimes the actual situation, and hence the advantage of giving the plaintiff an option.² In modern practice, however, the sufficiency of a probate bond, with principal and sureties, may be of great consequence.

English precedents establish that, in various instances, the representative may be sued as such, on a promise made by him in the representative character, so that a declaration founded on such a promise will charge him no further than though the promise had been made to the decedent himself. As, perhaps, upon the executor's promise to pay an award made after his testator's death upon an arbitration previously entered into by the testator himself.³ Or in instances where the plaintiff avers simply a liability of the defendant *as executor*, or *as administrator*;⁴ though exceptions like these raise nice distinctions in pleading not always clear to the logical mind, nor wholly satisfactory to the common-law judges who feel compelled to recognize them.⁵ These distinctions appear to have originated in a judicial effort to shield the personal representative from individual loss, where the plaintiff's cause of action originated, essentially during the decedent's life, and upon the decedent's own promise, not that of the representative; the latter having done scarcely more on his part than to recognize the claim as still binding. And, consequently the plaintiff was remitted to the assets, the court treating the representative's own engagement as presupposing an adjustment on such a basis.⁶

¹ Thomas, J., in *Luscomb v. Ballard*, 5 Gray, 403.

² *Ashby v. Ashby*, 7 B. & C. 449.

³ *Dowse v. Coxe*, 3 Bing. 20; reversed, however, on appeal, though on a different ground. 6 B. & C. 255.

⁴ *Secar v. Atkinson*, 1 H. Bl. 102; *Ashby v. Ashby*, 7 B. & C. 444; Wms. Exrs. 1773.

⁵ See *Rose v. Bowler*, 1 H. Bl. 108; 7 Taunt. 536; also Lord Tenterden and

Littledale, J., in *Ashby v. Ashby*, 7 B. & C. 449, 452; Wms. Exrs. 1771-1776, where these cases are collated. And see *Scott v. Key*, 9 La. Ann. 213. In *Chouteau v. Suydam*, 21 N. Y. 179, the subject matter of the contract was in fact a contract liability of the testator incurred during his life. And see *Pugsley v. Aiken*, 1 Kern. 494.

⁶ So is it held in this country that for property lawfully received by the

§ 396. **Representative how sued upon his Express Promise, Collateral Undertaking, etc.** — If an executor or administrator promises in writing, that, in consideration of having assets, he will pay a particular debt of his decedent, or otherwise brings himself within the rule of a personal collateral undertaking for his decedent's obligation,¹ he may be sued on this promise in his individual capacity, and the judgment against him will be *de bonis propriis*.² The plaintiff should in such case aver assets, or a forbearance to one, or some other consideration. And, in general, where the nature of the debt is such as renders it binding upon the representative as an individual, whether because he contracted it or because he has assumed the liability which originated against the decedent, the judgment will be against him *de bonis propriis*, although he promised nominally in the official capacity.³

§ 397. **Representative liable as an Individual, where Cause of Action wholly accrued after his Decedent's Death, on Transactions with Him, etc.** — In causes of action wholly accruing after his decedent's death, the personal representative is in general liable individually.⁴ And wherever an action is brought against an executor or administrator, on promises said to have been made by him after his decedent's death, he is chargeable in his own right and not as representative.⁵ In general, an action for goods sold and delivered to one as representative, or for work done, or services rendered, at his

executor and administrator, and held as assets, he is liable to any party having a good title, either in his representative character, or personally *de bonis propriis*, at such party's election. *De Valengin v. Duffy*, 14 Pet. 282. The remarks of Taney, C. J., in this case, seem to favor considerable latitude as to allowing a plaintiff to sue the representative, at election, either in his individual or representative capacity, though the demand should wholly accrue after the decedent's death. And see *supra*, § 382.

¹ *Supra*, § 255.

² *Ib.*; *Wms. Exrs.* 1783; *Cro. Eliz.*

91; *Taliaferro v. Robb*, 2 Call. 258. But as to the necessity of averring assets, *cf. Wms. Exrs.* 1776; 7 Taunt. 580; 3 Bing. 20. If there were no assets, the promise of the representative is *nudum pactum*. *Supra*, § 255.

³ *Wms. Exrs.* 1783; *Corner v. Shew*, 3 M. & W. 350; *supra*, § 256; *Johnston v. Union Bank*, 37 Miss. 526; *Wood v. Tunncliffe*, 74 N. Y. 38.

⁴ *De Valengin v. Duffy*, 14 Pet. 282; *Kerchner v. McRae*, 80 N. C. 219.

⁵ *Wms. Exrs.* 1771; *Cro. Eliz.* 91; *Cowp.* 289; *Jennings v. Newman*, 4 T. R. 348.

request, in the settlement of the estate, should be brought against the defendant personally, and not in his representative character.¹ Wherever, in fact, the action is brought against the executor or administrator on his own contracts and engagements, though made for the benefit of the estate, this rule holds true; and his promise "as executor," or "as administrator," will not alter its application.² For, having no power to bind the estate specifically by his engagements, the representative binds himself; there can, therefore, be no judgment out of the decedent's goods, and the action must be brought declaring against him in his right.³ The judgment is rendered *de bonis propriis*, and he must respond accordingly.⁴

But for one to maintain such suit against the representative individually, the latter should have been an actual party to the contract or transaction. For, it is said, an executor or administrator is not liable, either personally or in his representative character, for services beneficial to the estate performed without his assent, after the decedent's death and before his own appointment, under contract with the special administrator or with one who declined the trust of executor.⁵

§ 398. **Exceptional Instance of suing for Funeral Expenses, etc.**—An action, however, may be maintained in various States against an executor or administrator, as such, for the funeral expenses of the deceased; charging him thus in his representative character, so that judgment may be rendered *de bonis decedentis*.⁶ But the case stands on its peculiar ground of exception;⁷ claims of this character taking the

¹ *Corner v. Shew*, 3 M. & W. 350; *Austin v. Munro*, 47 N. Y. 360; *Davis v. French*, 20 Me. 21; *Myer v. Cole*, 12 Johns. 349; *Matthews v. Matthews*, 56 Ala. 292; *supra*, § 256; *Lovell v. Field*, 5 Vt. 218; *Harding v. Evans*, 3 Port. 221; *Baker v. Moor*, 63 Me. 443.

² *Beaty v. Gingles*, 8 Jones L. 302; *Hopkins v. Morgan*, 7 T. B. Mon. 1.

³ *Barry v. Rush*, 1 T. R. 691; *Sumner v. Williams*, 8 Mass. 199; *Davis v. French*, 20 Me. 21, *per* Shepley, J.; *supra*, § 256.

⁴ *Seip v. Drach*, 14 Penn. St. 352;

Powell v. Graham, 7 Taunt. 585; *Corner v. Shew*, 3 M. & W. 350; *Wms. Exrs.* 1783.

⁵ *Luscomb v. Ballard*, 5 Gray, 403. And see *Matthews v. Matthews*, 56 Ala. 292; *Ross v. Harden*, 44 N. Y. Super. 26; *Tucker v. Whaley*, 11 R. I. 543.

⁶ *Hapgood v. Houghton*, 10 Pick. 154; *Seip v. Drach*, 14 Penn. St. 352; *Rappelyea v. Russell*, 1 Daly, 214; *Campfield v. Ely*, 13 N. J. L. 150; *Samuel v. Thomas*, 51 Wis. 549.

⁷ *Thomas, J.*, in *Luscomb v. Ballard*, 5 Gray, 405.

priority of most general debts originating with the decedent himself, and being *sui generis*, nor depending wholly upon strict contracts with a representative. The modern English doctrine on this point is, that if the executor or administrator gives orders for the funeral, or ratifies or adopts the acts of another party who has given orders, he makes himself liable personally and not in his representative capacity; and such, too, is the rule of various States.¹

¹ *Corner v. Shew*, 3 M. & W. 350; 8 Ad. & El. 349 n.; Wms. Exrs. 1788, 1791; *Ferrin v. Myrick*, 41 N. Y. 315. As to supplying a tombstone, see 25 Hun, 4. And see c. *past* as to funeral expenses.

Qu. whether valuable services rendered in taking care of the effects, etc., after the decedent's death, and before any representative was appointed, might not be brought within the reason of this same exception in meritorious instances. This service, like that of burial, may be performed out of kindness or necessity, as it were, and without a previous contract, as by a custodian who must search out the kindred. See *supra*, § 193; *Luscomb v. Ballard*, 5 Gray, 403.

When the law as to remedies proves so uncertain as to leave one in fundamental doubt as to whether one shall sue or be sued in the individual or representative capacity, in a particular instance, the legislature should intervene and make a more flexible rule. Among numerous cases which might be adduced in proof of the genuine uncertainty which has prevailed in the law,

because one must distinguish clearly between contracts of the decedent and contracts of the decedent's representative, *Austin v. Munro*, 47 N. Y. 360, is worthy of study, with the distinctions announced in the opinion of the court. In *Snead v. Coleman*, 7 Gratt. 300, a State court appears to have continued in a quandary as to whether the suit should have been brought against representatives officially or as individuals. It seems highly desirable that such litigation should be allowed to go at option or in the alternative; that a joinder of a cause founded upon the contract of an intestate with one founded upon the contract of the representative should be allowed, or that the action itself should be capable of conversion from one form to another, final judgment being rendered according to the facts and as justice might require. At present, there is always great danger that a suit founded on a just cause of action may fall to the ground because of some misconception at the outset as to whether the contract originated with the decedent or the decedent's representative. See appendix, *past*.

CHAPTER VI.

CO-ADMINISTRATION AND QUALIFIED ADMINISTRATION.

§ 399. **Doctrines of foregoing Chapters apply to Qualified Trusts.**—The doctrines discussed in our previous chapters, concerning the powers, duties, and liabilities of the personal representative, apply, *mutatis mutandis*, to all executors and administrators. But, as we have already observed in an earlier part of this treatise,¹ administration is not always original and general, but qualified in various instances, as the circumstances of appointment may require. General doctrines require, moreover, a special adaptation to suit the case, where two or more are appointed to the same trust. Co-administration and qualified administration, therefore, considered with reference to the peculiar powers and responsibilities which attach to such appointees, will claim our attention for the present chapter.

§ 400. **Rights, Duties, and Liabilities of Co-Executors; their Title and Authority.**—And *first*, as to the rights, duties, and liabilities of co-executors and co-administrators. Co-executors, unless the will under which they act directs otherwise, are to be treated in law as one and the same individual; and consequently whatever each one does is taken to be the act of both or all, their authority being joint and entire.² Hence, too, if one of them dies, the fiduciary interest, being joint and entire, will vest in the survivor; this even, to cite the earlier writers, without any new grant of letters.³

¹ See *supra*, Part II. c. 4.

² Wms. Exrs. 911, 946; 3 Bac. Abr. tit. Executors, D; Wentw. Off. Ex. 206, 14th ed.; Rigby, *Ex parte*, 19 Ves. 462; Edmonds *v.* Crenshaw, 14 Pet. 166; Stewart *v.* Conner, 9 Ala. 803; Wilkerson *v.* Wootten, 28 Ga. 568; Gilman *v.* Healy, 55 Me. 120. As to

the limitations which a will may have imposed in this respect, see *supra*, § 51.

³ Cas. temp. Talb. 127; Wms. Exrs. 911. But upon this point see *supra*, § 40. Where a co-executor named in the will renounces probate, the others who qualify exercise all the authority

And this survivorship carries such sweeping consequences that, as equity precedents establish, if all the residue of the testator's effects, after the payment of debts and legacies, were left to his co-executors, and one of them should happen to die before the joint interest in the residue was severed, his share would survive to the decedent's co-executor to the exclusion of his own personal representatives;¹ a result most inequitable, and not to be admitted if, by statute provision or a fair construction of the particular will, so absolute a survivorship may be ruled out.²

As incidental to their joint and entire title, it is held at common law that if one of two executors grants or releases his interest in the estate to the other, nothing shall pass, because each was possessed of the whole before;³ and, furthermore, that they cannot sue in right of the deceased upon a contract made by a defendant jointly with one of the co-executors, since this would be like permitting a man to sue himself.⁴ But, while a party bound in a contract with others, whereby he becomes both obligor and obligee, cannot maintain on such contract an action at law; or, in other words, cannot sue himself at law, if the contract be joint;⁵ he may if it be joint and several. On this distinction it is held, recently, that a note executed by one of two executors, in favor of himself and his co-executor, may be enforced by the two in an action against the indorsers.⁶

Of two or more executors under a will, moreover, each is entitled to receive any part of the assets, and to collect any debts.⁷ An assignment or release, valid under the gen-

and incur all the responsibilities incidental to the office. *Supra*, § 51.

¹ Wms. Exrs. 913; 2 Bro. C. C. 220; 3 Bro. C. C. 455; *Knight v. Gould*, 2 My. & K. 295.

² If one of several legatees be an executor, his single assent to his own legacy will vest the title in him; or, if the subject be entire, and be given to all the executors, one may assent sufficiently to his own proportion. 1 Roll. Abr. 618; Wms. Exrs. 948; *Cole v. Miles*, 10 Hare, 179.

³ Godolph. pt. 2, c. 16, § 1; Wms. Exrs. 911.

⁴ Godolph. pt. 12, § 2; Wms. Exrs. 913; 2 Chitt. 539.

⁵ *Moffat v. Van Millingen*, 2 B. & P. 124.

⁶ *Faulkner v. Faulkner*, 73 Mo. 327. A note given by an executor in favor of himself and his co-executor, for money of the estate used by himself, is not void for want of consideration. *Ib.*

⁷ *Edmonds v. Crenshaw*, 14 Pet. 166; *Stewart v. Conner*, 9 Ala. 803.

eral rules of administration, is valid when given by any one of them.¹ It is held that one executor may release or assign a mortgage of real or personal property belonging to the estate without the signature or assent of his co-executors.² Or enter into an amicable action, and submit to an arbitration.³ Or compromise as any other executor or administrator may do.⁴ Or assign or indorse over a promissory note made payable to the testator.⁵ Or settle an account with a debtor, provided he does so honestly and with the usual measure of prudence.⁶ Or grant or surrender a lease or term.⁷ Or sell and dispose of assets on behalf of all.⁸ Or assent sufficiently to a legacy.⁹ Or discharge a security taken for the payment of a debt due the estate, on a satisfaction made to him.¹⁰ In short, as regards personal assets, any one of several co-executors may do whatever all could have done, and under like qualifications.¹¹

While, however, one executor may thus transfer the legal title to property, and even make a delivery not in all respects effectual as to title, which shall, nevertheless, give the transferee every legal advantage, a court of equity declines, wherever its assistance is invoked, to enforce or confirm an unjust transaction of this character;¹² and, perhaps, on the suggestion of fraud, collusion, and unfair dealing, will set aside or disallow the transaction, at the instance

¹ As to release, see *Wms. Exrs.* 946; *2 Ves. Sen.* 267; *Shaw v. Berry*, 35 Me. 279; *Stuyvesant v. Hall*, 2 Barb. 151; *Devling v. Little*, 26 Penn. St. 502; *Hoke v. Fleming*, 10 Ired. L. 263. But several releases by joint executors do not bar their legal joint claim against the debtor. *Pearce v. Savage*, 51 Me. 410.

² *Weir v. Mosher*, 19 Wis. 311; *Son v. Miner*, 37 Barb. 466; *George v. Baker*, 3 Allen, 326. And see *Bogert v. Hertell*, 4 Hill, 492.

³ *Lank v. Kinder*, 4 Harring. 457.

⁴ *Weir v. Mosher*, 19 Wis. 311; *Wms. Exrs.* 946, and Perkins's note.

⁵ *Dwight v. Newell*, 15 Ill. 333;

Bogert v. Hertell, 4 Hill, 492; *Wheeler v. Wheeler*, 9 Cow. 34.

⁶ *Smith v. Everett*, 27 Beav. 446.

⁷ *Simpson v. Gutteridge*, 1 Madd. 616. And see 11 M. & W. 773, commenting upon *Turner v. Hardey*, 9 M. & W. 770.

⁸ *Cro. Eliz.* 478; *Murrell v. Cox*, 2 Vern. 570. But *cf. Sneesby v. Thorne*, 7 De G. M. & G. 399.

⁹ *Wentw. Off. Ex.* 413; *Wms. Exrs.* 948.

¹⁰ *People v. Keyser*, 28 N. Y. 226.

¹¹ *Bodley v. McKinney*, 9 Sm. & M. 339.

¹² *Lepard v. Vernon*, 2 Ves. & B. 51; *Sneesby v. Thorne*, 7 De G. M. & G. 399.

of the co-executor.¹ For the acts of any co-executor, committed outside the scope of an honest and sufficiently prudent administration, are not to be sustained in courts of equity or probate.

§ 401. **The same Subject.** — In the settlement of an estate by co-executors, the exclusive custody and control of the assets vests in no one of their number. Each executor has a right of possession to the personal property, and a right of access to the papers.² The act of one, in possessing himself of assets, is the act of all, so as to entitle them to a joint interest in possession, and a joint right of action if they are afterwards taken away.³ But there may be a contract between joint executors concerning the funds of the estate and management, and this upon perfectly valid consideration as between themselves.⁴ And, in order to act with becoming prudence, it is well that the funds should be kept so that both or all the executors shall exercise control or supervision thereof together. Where such is the case, any person dealing with them is bound to recognize their joint title.⁵

It is held, moreover, that one of two executors cannot assign or indorse over a negotiable note made to them both, as executors, for a debt due to their testator.⁶ And the modern course of authority does not permit a co-executor to bind the others personally by his new promise to pay in future even a debt of the estate; and such a promise, or an admission of indebtedness, cannot be received in evidence against his co-executors; and the same holds true where the promise is expressed by an instrument signed by one of the executors

¹ Wms. Exrs. 948, note; Touchst. 484; *Le Baron v. Long Island Bank*, 53 How. (N. Y.) Pr. 286. As to aiding in equity a deed made by one co-executor, but authorized and approved by the others, as merely an imperfect execution of the power given by the will, see *Giddings v. Butler*, 47 Tex. 535.

² *Chew's Estate*, 2 Pars. Sel. (Pa.) 153; *Wood v. Brown*, 34 N. Y. 337; *Hall v. Carter*, 8 Ga. 388.

³ *Nation v. Tozer*, 1 Cr. M. & R. 174, *per* Parke, B.

⁴ *Berry v. Tait*, 1 Hill (S. C.) 4; *Faulkner v. Faulkner*, 73 Mo. 327.

⁵ Thus, if they open a joint account with a banker, both must unite in a receipt or check in order to discharge him. *De Haven v. Williams*, 80 Penn. St. 480.

⁶ *Smith v. Whiting*, 9 Mass. 334.

alone.¹ As to whether the new promise of one executor can bind the estate, however, the decisions are found discordant in jurisdictions where a positive rule fixed by the legislature is wanting.²

§ 402. **Co-Executors; their Liability, etc.** — Good faith and the usual measure of prudence applicable to fiduciaries should characterize the conduct and dealings of co-executors. In administering the assets, each co-executor is at this day often held responsible for the safety of the fund, so as not to be utterly excused from losses incurred by the carelessness or misconduct of his fellow.³ A dishonest, unauthorized, or imprudent sale, transfer, or investment is no more to be sanctioned where the executorship is joint than where it is sole.⁴ And, inasmuch as each executor has an independent right to control and transfer the assets, one is bound not to be heedless as to his co-executor's conduct, but rather, as in requiring a joint deposit or transfer, or joint investment of funds, to impose a check upon the other's authority. For, if an executor, by any act or default on his part, places the estate and its management in the exclusive power of his co-executor, he takes the perils of the latter's maladministration upon himself, unless he exercised what American courts would call ordinary prudence.⁵

¹ *Tullock v. Dunn*, Ry. & Moo. 416; *Scholey v. Walton*, 12 M. & W. 509; *Forsyth v. Ganson*, 5 Wend. 558; *Elwood v. Diefendorf*, 5 Barb. 398. One of several executors has no power to charge the estate or his co-executor by indorsing a note in the name of the estate, even though it be given in renewal of one indorsed by the testator in his lifetime. *Bailey v. Spofford*, 21 N. Y. Supr. 86. See *supra*, § 293, as to the effect of a representative's promissory note.

² See *Shreve v. Joyce*, 36 N. J. L. 44, where it is held that it can. And see *Emerson v. Thompson*, 16 Mass. 431; *Cayuga Co. Bank v. Bennett*, 5 Hill, 236. But the promise of one will not avail against the estate in some States.

Peck v. Bottsford, 7 Conn. 172; *Reynolds v. Hamilton*, 7 Watts, 420. The promise or acknowledgment growing out of the decedent's original contract, the difficulty is fundamental. The English view is not clearly expressed. *Scholey v. Walton*, *supra*. But the subject is now controlled in that county by stat. 9 Geo. IV. c. 14, § 1, which provides that the promise shall be in writing, and shall only affect the executor making it.

³ *De Haven v. Williams*, 80 Penn. St. 480.

⁴ *Le Baron v. Long Island Bank*, 53 How. (N. Y.) Pr. 286; *Lacey v. Davis*, 4 Redf. (N. Y.) 402; *Case v. Abell*, 1 Paige, 393.

⁵ See *supra*, § 315. The English

Thus, if an executor delivers or assigns securities to his co-executor in order to enable the latter to receive the money alone,¹ or draws or indorses in his favor a bill or note to a similar end,² or leaves him free to negotiate a transfer or make a sale at his sole discretion, or gives him a power of attorney on his own behalf, thereby deputing that control and supervision which the office made it incumbent upon a co-executor to exercise, he cannot wholly escape legal liability for the ill consequences.³ Nor is he exempt from a personal liability, if he neglect unreasonably enforcing the payment of a debt which his co-executor owed the estate, and was legally bound to pay.⁴ But, if he can show that his own conduct was within the usual rule of prudence and good faith, under all the circumstances, and that he did not contribute to the loss, upon such a standard of liability, he is excused; for the cardinal doctrine is that co-executors are liable each for his own acts and conduct, and not for the acts or conduct of his co-executors.⁵

cases may consistently treat the co-fiduciary as one having no recompense, and hence, as required, rather to exercise slight prudence, like a gratuitous bailee, or so as not to be in "wilful neglect or default." *Ib.* It does not appear that the English precedents furnish the true standard for American courts in this respect.

¹ *Candler v. Tillett*, 22 Beav. 236.

² 2 Bro. Ch. 114; *Hovey v. Blake-man*, 4 Ves. 608.

³ *Clough v. Dixon*, 3 M. & C. 497; *Dix v. Burford*, 19 Beav. 412; *Edmonds v. Crenshaw*, 14 Pet. 166; *Sparhawk v. Buell*, 9 Vt. 41; *Wood v. Brown*, 34 N. Y. 337; *Heath v. Allen*, 1 A. K. Marsh. 442.

⁴ *Styles v. Guy*, 1 Mac. & G. 422; *Candler v. Tillett*, 22 Beav. 257; *Carter v. Cutting*, 5 Munf. 223.

⁵ *Cro. Eliz.* 318; *Wentw. Off. Ex.* 306; *Wms. Exrs.* 1820, and note by Perkins; *Williams v. Nixon*, 2 Beav. 472; *Peters v. Beverly*, 10 Pet. 532; *Perry Trusts*, § 421; *Douglas v. Satterlee*, 11 John. 16; *Fennimore v. Fenni-*

more, 2 Green Ch. 292; *Ames v. Armstrong*, 106 Mass. 18; *Moore v. Tandy*, 3 Bibb. 97; *Williams v. Maitland*, 1 Ired. Eq. 92; *Kerr v. Water*, 19 Ga. 136; *Call v. Ewing*, 1 Blackf. 301.

At common law, the acts of each executor within the scope of his authority, are, as concerns administration, the acts of all, with this qualification: that at common law each was responsible only for such assets as came to his own hands. Under ordinary circumstances, one of two or more executors was not to be held accountable for waste or other misconduct on his associate's part; and his misplaced confidence in the latter's integrity and capacity was not allowed to operate to his own prejudice. *Ames, J.*, in *Ames v. Armstrong*, 106 Mass. 18. But the development of this doctrine in courts of equity appears to have established the rule of the present day upon a somewhat different footing, as the text indicates; the question coming to be regarded, in view of the great extent to which any one of them could practically control and dispose of assets, rather as

The rule as thus announced may appear somewhat different from that applied in equity to co-trustees, whose functions, for the most part, as depending upon the express terms of the will or deed which created their authority, require that all should join in a particular act. Consequently, while co-trustees may not be liable for money which they did not receive, although they all joined in the receipt, co-executors have usually been held liable in such a case; for the act is an unmeaning one and unnecessary, unless they intend thereby to render themselves jointly answerable for the

involving the element of *contributory negligence or fraud*, on the part of the executor who claims immunity. And the view taken by courts of probate and equity, in passing upon the accounts of executorship, becomes more and more the material one in such cases. Even at common law, as it is admitted, whenever any part of the estate, by any act or agreement of one executor, passes or is entrusted to the custody of a co-executor, they are thereby rendered jointly responsible; for the inference arises that one, notwithstanding his power and opportunity to make the joint possession secure, has chosen to yield control to the other. Ames, J., in *Ames v. Armstrong*, *supra*. The whole subject seems to have been spun by the courts into a very fine web, reaching from point to point, but coming round again to the starting-place.

The mere circumstance that assets came to the hands of one's co-executor, does not, it is held, render him also liable. U. S. Dig. 1st series, Exrs. & Admsrs. 1711; Wms. Exrs. 1821. But it is said to be different where an executor hands them over to his co-executor, and the latter misapplies them. Dick. 356; *Macpherson v. Macpherson*, 1 Macq. H. of L. 243; *Sparhawk v. Buell*, 9 Vt. 41; *Edmonds v. Crenshaw*, 14 Pet. 166. Passiveness, in not obstructing the co-executor who gets control of the assets, has been considered as involving no liability. 11 Ves. 335; *Candler v. Tillett*, 22 Beav. 257. But

the exceptions engrafted upon this statement have destroyed its efficacy. 1 Mac. & G. 433 n.; Wms. Exrs. 1822, 1827. To stand by and see the co-executor commit a breach of duty renders one clearly liable. Ib. "The rule," adds Williams, "may, perhaps, be stated to be, that where, by any act done by one executor, any part of the representative estate comes to the hands of his co-executor, the former will be answerable for the latter, in the same manner as he would have been for a stranger whom he had intrusted to receive it." Wms. Exrs. 1822, referring to Cox's note to 1 P. Wms. 241; also 2 Bro. C. C. 117; *Booth v. Booth*, 1 Beav. 125; *Styles v. Guy*, 1 Mac. & G. 422. Failing to withdraw money from a banker, who happens to turn out insolvent, does not necessarily charge a co-executor, nor indeed a sole executor; and so with changing investments, originally justifiable, but which eventually prove unfortunate; or confiding in some agent or a co-executor who abuses the confidence placed in him. Wms. Exrs. 1825, 1826; *supra*, §§ 321, 323; *Chambers v. Minchin*, 7 Ves. 193; *Worth v. McAden*, 1 Dev. & Bat. Eq. 199; *Adair v. Brimmer*, 74 N. Y. 539. But to intrust large sums and large authority to one notoriously insolvent or irresponsible is a very different matter. The question reverts, in short, to the customary issue of good faith and prudence, considering all the circumstances, as in the case of a sole executor or administrator.

money.¹ Notwithstanding the numerous refinements of equity courts upon this rule (which Lord Eldon deplored), the only substantial exception appears to be that the mere joining in the receipt shall not have the conclusive effect of charging both.²

The reconciling principle appears to be that a co-executor who joins in a receipt is bound by the consequences, to the usual extent of requiring prudence and good faith; but that the act of so joining, though *prima facie* importing that the money came to the hands of both, is not conclusive evidence, but may be explained so as possibly to exonerate him. Where the act itself is such that, as under a trust, all the executors must join in it, the liability is placed rather on the footing of co-trusteeship; or, perhaps, it should be said that a court treats it as not imprudent for one to rely upon the assurance that no transfer or misappropriation can be made without his concurrence in the act. Thus would it be, for instance, where a power was vested in both under the will;³ or where stock cannot be transferred except by the signatures of all;⁴ or where the indorsement or assignment of some specific instrument requires the joint assent; or where the fund is deposited so as to remain subject to their joint check.⁵ Even thus, culpable carelessness in permitting the proceeds of the sale, or transfer, or assignment, to be paid to one, or

¹ Perry Trusts, § 421; 2 Eq. Cas. Abr. 456; Leigh v. Barry, 3 Atk. 584; Monell v. Monell, 5 John. Ch. 283; Jones's Appeal, 8 W. & S. 143; Clarke v. Jenkins, 3 Rich. Eq. 318.

² Westley v. Clarke, 1 Eden. 357; Doyle v. Blake, 2 Sch. & Lef. 242; Chambers v. Minchin, 7 Ves. 198. The course of the English precedents on this subject is traced in Wms. Exrs. 1834, 1835. And see Monell v. Monell, 5 John. Ch. 283; Lord Eldon's remarks in Walker v. Symons, 3 Swanst. 64.

³ Smith v. Moore, 6 Dana, 417; Bank of Port Gibson v. Baugh, 9 Sm. & M. 290; Kling v. Hummer, 2 Pa. 349; Carroll v. Stewart, 4 Rich. 200. It is a well established principle that power

conferred by will on two or more executors or trustees, unless a different intention is expressed in, or can be properly inferred from, the will which confers the power, cannot be legally and properly executed, unless all the co-executors or co-trustees to whom such power is delegated join in its execution. See Hart v. Rush, 46 Tex. 556; Adair v. Brimmer, 74 N. Y. 539.

⁴ Chambers v. Minchin, 7 Ves. 197; Hovey v. Blakeman, 4 Ves. 608. And see stat. 8 & 9 Vict. c. 91, cited Wms. Exrs. 948, 1825.

⁵ De Haven v. Williams, 80 Penn. St. 480. See Child v. Thorley, L. R. 16, Ch. D. 151.

the joint check collected by himself alone, would charge the co-executor who confided too imprudently in his associate.¹ For funds he suffers to be left unreasonably long in his co-executor's hands, or loans to him, the executor is responsible if they are misapplied, though so far as they are duly applied in the course of administration he is indemnified.² One executor has no right to rely upon the representations of his associate, but is bound to use due diligence in ascertaining for himself whether those representations are true.³ And one may become privy to a misapplication of funds by his co-executor, so as to become liable, when he tacitly suffers it to be done without making a remonstrance;⁴ for the act of one executor may be considered as adopted by his co-executor, when the latter's conduct virtually amounts to an assent, however reluctantly given.⁵

In short, an executor who, by his culpable negligence or fraud, suffers his co-executor to waste the estate, participates in the breach of trust so as to render himself liable to the beneficiaries;⁶ and each case of this kind must depend largely upon its own peculiar circumstances, taking into account the apparent knowledge and acquiescence of one executor in the acts and transactions of the other, and the power and control which the former may have deliberately permitted the latter to exercise.⁷

¹ *Croft v. Williams*, 23 Hun (N. Y.) 102. A loan by co-executors to one of them is a breach of trust, rendering all liable. *Stickney v. Sewell*, 1 My. & Cr. 8; *Wms. Exrs.* 1809.

² *Scurfield v. Howes*, 3 Bro. Ch. 91; 11 Ves. 252; *Croft v. Williams*, 23 Hun (N. Y.) 102; *Lincoln v. Wright*, 4 Beav. 427; *Perry Trusts*, § 423; *Hays v. Hays*, 3 Tenn. Ch. 88.

³ *Chambers v. Minchin*, 7 Ves. 197; *Shiphbrook v. Hinchbrook*, 11 Ves. 254; *Perry Trusts*, § 423; *Clark v. Clark*, 8 Paige, 152. See *Atcheson v. Robertson*, 3 Rich. Eq. 132.

⁴ *Whitney v. Phoenix*, 4 Redf. (N. Y.) 180; *Brown's Accounting*, 15 Abb. Pr. N. S. 457.

⁵ *Nelson v. Carrington*, 4 Munf. 332.

⁶ *Holcombe v. Holcombe*, 13 N. J. Eq. 413; *Hengst's Appeal*, 24 Penn. St. 413; *McDowall v. McDowall*, 1 Bailey Eq. 324; *Adair v. Brimmer*, 74 N. Y. 539; *Anderson v. Earle*, 9 S. C. 460.

⁷ *Blake v. Pegram*, 109 Mass. 541; *Fonte v. Horton*, 36 Miss. 350; *Clarke v. Blount*, 2 Dev. Eq. 51. Permitting one executor to have securities for a sale, on his promise to pay the proceeds into the joint account, which promise he failed to keep, is not necessarily such culpable negligence as charges the other co-executors who thus confided, especially if that co-executor was under bonds or gave good security. *Adair v.*

But one of several executors has no inherent authority to borrow money without the assent of the others; nor is such assent to be assumed from the fact that the loan procured was for the benefit of the estate.¹ It is held that one cannot alone create a pecuniary liability by his purchase.² And that where one knows of a superior debt, and conceals the fact from his co-executor, the latter shall not be considered guilty of a *devastavit*, by paying the inferior debt.³ For the proceeds of a claim, known to one only of the co-executors, and collected by him, or for other assets coming to his secret possession, he alone ought *prima facie* to be held accountable. In general, therefore, where an executor performs acts outside the usual scope of authority incidental to administration, thereby rendering himself and not the estate immediately liable, it can usually impute no blame to his co-executor, who was ignorant thereof, that the latter took no precaution to save the estate from loss; and hence, such co-executor is not to be held responsible, unless, at all events, he was culpably careless in procuring knowledge of the transaction, or in acting upon such knowledge after he had gained it. For his own fraud alone, or his own negligence, whether as a contributory or otherwise, should each executor be held chargeable.⁴

§ 403. **Co-Executors; Actions by and against.** — All executors should join in bringing actions on behalf of the estate,⁵

Brimmer, 74 N. Y. 539. But where excessive payments are made or moneys drawn by one executor, with the consent or acquiescence of the others, out of a fund which has been collected and has come into their joint possession and control, they all become liable to make the excess good to beneficiaries whose rights under the will are at any stage impaired thereby. So, too, where an executor, by his negligence, suffers his co-executor to receive and waste the estate, when he might by proper care have prevented it, he is liable to the beneficiaries for the waste. *Ib.*

¹ Bryan v. Stewart, 83 N. Y. 270.

² Scruggs v. Driver, 13 Ala. 274.

³ Hawkins v. Day, Ambl. 162.

⁴ Directions in a will, which vest a peculiar confidence and control of assets in one of the executors, may be set up by the co-executor as relieving him specially of an abuse by the other which was without his own participation. Vanpelt v. Veghte, 14 N. J. L. 107. Where the testamentary functions are divided by the will, and each confines himself to his allotted functions, the liability appears to be several and not joint. Girod v. Pargoud, 11 La. Ann. 329.

⁵ Wms. Exrs. 956, 1867, and Perkins's

and correspondingly should be sued together. But if one executor contracts alone on his own account, it would appear that he must sue alone on such contract, notwithstanding the proceeds recovered will be assets.¹ And upon a sale of assets made by himself alone, he doubtless may sue for the price, not naming himself executor;² so, if goods be taken out of the possession of one, he may sue alone to recover them.³

As a rule, co-executors cannot sue or be sued at law, by one another.⁴ But here, as elsewhere, we speak of co-executors in the modern sense, that they have all accepted and qualified themselves for the trust.⁵ In equity, contrary to the rule of law, one executor may sue another; and courts of equity will entertain such proceedings for the purpose of making a delinquent executor liable to his co-executor, to force an account, to complete the foreclosure of a mortgage, and otherwise where justice requires it, and there is no adequate redress at law.⁶ In some States it is now held that

note; 1 Chitty Pl. 16th Am. ed. 21, 23; *Bodle v. Hulse*, 5 Wend. 313. Advantage should be taken of non-joinder, however, by a plea in abatement. 1 Saund. 291; 1 Chitty Pl. 16th Am. ed. 23; *Packer v. Willson*, 15 Wend. 343; *Wms. Exrs.* 1868. The common law appears to have insisted that even those neglecting or renouncing probate should join in the action. 1 Salk. 3; 9 Co. 37 a; *Creswick v. Woodhead*, 4 M. & Gr. 811. But this formality is inconsistent with equity practice, and, indeed, with our whole modern theory of probate, which insists that only executors who qualify and receive the probate credentials shall be required or entitled to sue. *Davies v. Williams*, 1 Sim. 8; *Thompson v. Graham*, 1 Paige, 384; *Rinehart v. Rinehart*, 15 N. J. Eq. 44; *Heron v. Hoffner*, 3 Rawle, 393; *Alston v. Alston*, 3 Ired. 447. Modern practice acts are to the same purport. *Moore v. Willett*, 2 Hilt. 522. And in England, under the recent probate act, the rule has been altered so as to harmonize with this theory. *Wms. Exrs.* 286; Act

20 & 21 Vict. c. 77, § 79. Co-executors, when sued, may plead differently. *Wms. Exrs.* 1942; 1 Stra. 20; 1 Roll. Abr. 929; *Geddis v. Irvine*, 5 Penn. St. 308.

¹ *Heath v. Chilton*, 12 M. & W. 632.

² *Brassington v. Ault*, 2 Bing. 177; *Wentw. Off. Ex.* 224; *Wms. Exrs.* 911; *Aiken v. Bridgman*, 37 Vt. 249; *Laycock v. Oleson*, 60 Ill. 30.

³ *Wms. Exrs.* 1869. See *supra*, § 281.

⁴ *Wentw. Off. Ex.* 75; *Wms. Exrs.* 957.

⁵ Thus, a creditor of the deceased who is made an executor by the will, and accepts the office, cannot sue his co-executor on the demand. *Saunders v. Saunders*, 2 Litt. 314; *Martin v. Martin*, 13 Mo. 36. But if he renounced the trust in effect, he can; for he is then no executor. *Dorchester v. Webb*, W. Jones, 345; *Wms. Exrs.* 957, and *Perkins's note*; *Hunter v. Hunter*, 19 Barb. 631.

⁶ *Peake v. Ledger*, 8 Hare, 313; *Case's Appeal*, 35 Conn. 117; *Wms. Exrs.* 1911, and *Perkins's note*; *Storms v. Quackenbush*, 34 N. J. Eq. 201; Mc-

an executor may sue his co-executor on the latter's express promise;¹ and in other special instances.² Equity may be invoked to relieve one executor from the fraudulent misconduct of his co-executor, and to enjoin maladministration from being committed.³

§ 404. **Rights, Duties, and Liabilities of Co-Administrators.**—

In respect of rights, duties, and liabilities, co-administrators stand upon the same footing as co-executors; with, of course, the difference that their functions, being defined by general and positive law, are scarcely capable of special variation. Co-administrators are to be regarded in the light of an individual person. Their interest is joint and entire; the acts of one in respect of administration are taken to be the acts of all;⁴ and as to liability for one another's acts, the doctrine corresponds to that of co-executorship.⁵

§ 405. **Survivorship among Co-Executors or Co-Administrators.**—

The authority of an executor, as we have observed, is not determined by the death of his co-executor, but survives to him.⁶

Gregor v. McGregor, 35 N. Y. 218; 35 N. J. Eq. 374; 4 N. J. L. 189; King v. Shackelford, 13 Ala. 435.

¹ Phillips v. Phillips, 1 Stew. (Ala.) 71.

² Where one of the co-executors gives the debtor a direction in violation of his duty, and refuses to join in a suit for the debt, the other executor may sue for the debt, and join his co-executor as defendant. Strever v. Feltman, 1 Thomp. & C. (N. Y.) 277.

³ Nason v. Smalley, 8 Vt. 118; Elmendorf v. Lansing, 4 Johns. Ch. 562; Sheehan v. Kennelly, 32 Ga. 145.

A desirable course, in modern probate practice, where a co-executor misbehaves or becomes unsuitable for the trust, is to procure his removal or resignation. See *supra*, § 154; Hesson v. Hesson, 14 Md. 8.

⁴ One of two joint administrators may release a right of action which belonged to the decedent. Bryan v. Thompson,

7 J. J. Marsh. 587; Gage v. Johnson, 1 McCord, 492; Murray v. Blatchford, 1 Wend. 583. And see Rick v. Gilson, 1 Penn. St. 54. But a note, being made payable to the co-administrators, one alone cannot assign it. Sanders v. Blain, 6 J. J. Marsh. 446. And as to part payment to one of several administrators, see Gullledge v. Berry, 31 Miss. 346.

⁵ Johnson v. Corbett, 11 Paige, 265; Jeroms v. Jeroms, 18 Barb. 24. Lord Hardwicke once attempted a distinction as between co-executors and co-administrators, the latter being appointed solely by the ordinary. Hudson v. Hudson, 1 Atk. 460. But the *dictum* was afterwards disapproved. Jacomb v. Harwood, 2 Ves. Sen. 268; Smith v. Everett, 27 Beav. 454; Wms. Exrs. 950. But see Gordon v. Finlay, 3 Hawks. 239.

⁶ Flanders v. Clarke, 3 Atk. 509; *supra*, § 51.

And so, too, is it with co-administrators.¹ Where, however, the will gives a power (as for selling lands) to several executors, and one of them dies, it has been a question whether the survivor or survivors can exercise that power; but judicial inclination must be to decide in the affirmative,² wherever the terms of the will admit of a favorable construction.³ A power to sell which arises from implication, instead of being expressed, is held to survive, as among co-executors, in the same manner.⁴ Even where the power itself is extinguished, equity will interpose to avert mischievous consequences, by compelling the person having the legal estate to execute it.⁵

The personal representative of a deceased co-executor cannot, according to the old rule of common law, be sued by his survivor in the trust, for a debt due to their testator,⁶ nor in respect to a breach of trust. But our modern practice acts relax this doctrine to a considerable extent.⁷ In equity, moreover, the surviving executor, if himself innocent of participation in the wrong, may file a bill to have set aside a transaction committed in breach of trust, by his associate, during his lifetime;⁸ nor, as it is held, does the fact of his

¹ Cas. temp. Talb. 127; Wms. Exrs. 911, 951. It is thus, in general, where one of the representatives is removed or allowed to resign the trust. See *supra*, § 41; Shelton v. Homer, 5 Met. 462.

² Wms. Exrs. 954-956; Co. Litt. 113 a, and Hargrave's note; 1 Sugd. Pow. 144, 6th ed.; Brassey v. Chalmers, 16 Beav. 231; s. c. 4 De G. M. & G. 528.

³ 1 Sugd. Pow. 141; Wms. Exrs. 7th ed. 954; Gould v. Mathers, 104 Mass. 283. Where the number of co-executors is lessened by one renouncing probate, a similar question of testamentary construction may arise. Granville v. McNeile, 7 Hare, 156.

⁴ Wms. Exrs. 655, 955; Forbes v. Peacock, 11 M. & W. 630; 4 Kent Com. 325-327; Treadwell v. Cordis, 5 Gray, 341; Peter v. Beverly, 10 Pet. 532; Wms. Exrs. 955, and Perkins's note.

⁵ 1 Sugd. Pow. 144; Wms. Exrs. 956.

For co-executors to execute a power in favor of one of the co-executors named, who has renounced or resigned, appears upon some controversy to be legal. Mackintosh v. Barber, 1 Bing. 50. But equity may well refuse countenance to an execution of this kind, as being contrary to good policy and a testator's presumed intention. Shelton v. Homer, 5 Met. 467; Wms. Exrs. 953.

⁶ Wentw. Off. Ex. 75; Wms. Exrs. 957.

⁷ When an executor or administrator dies, resigns, or is removed, the survivor, as rightfully entitled to assets, may sue him or his estate at law; at least if it be upon a promissory note or instrument executed by the late associate. Hendricks v. Thornton, 45 Ala. 299.

⁸ See, as to setting aside a mortgage of assets, made by the deceased executor in breach of trust, Miles v. Durn-

having taken out administration upon the estate of the executor who misconducted in the trust, disqualify him from maintaining his suit.¹ Redress is granted by equity in other instances, on behalf of the surviving executor or executors.²

So, too, is a bill in equity maintainable by the personal representative of one executor or administrator against the surviving executor or administrator, for account and settlement of affairs arising out of the joint administration.³

§ 406. **Liability of Co-Executors and Co-Administrators on Bonds; Joint or Several Bonds.**—Where co-executors or co-administrators qualify by giving bond to the judge of probate, as they are usually in our modern practice compelled to do before letters can issue to them,⁴ the form of the bond executed may affect very seriously their liability, and that of their sureties, to persons interested in the estate. Co-executors or co-administrators, who give a joint and several bond, render themselves jointly and severally liable as principals for waste committed by either, though without fault upon the part of both, and for the proper administration of all assets which come to their possession and knowledge.⁵ This liability covers all breaches of the bond and *devastavit*, occurring while the joint relation continues.⁶

Chancery will enforce, where it may, a just contribution as between the joint executors in all such cases.⁷

ford, 2 De G. M. & G. 641. And see *Turner v. Wilkins*, 56 Ala. 173.

¹ *Miles v. Durnford*, *supra*.

² As for enforcing a decree against the late co-executor, see *Chew's Appeal*, 2 Grant (Pa.) 294.

³ *Huff v. Thrash*, 75 Va. 546. And see *Fitzsimmons v. Cassell*, 98 Ill. 332.

⁴ *Supra*, § 145.

⁵ *Brazier v. Clark*, 5 Pick. 96; *Hughlett v. Hughlett*, 5 Humph. 453; *Newton v. Newton*, 53 N. H. 537; *Marsh v. Harrington*, 18 Vt. 150; *Pearson v. Darrington*, 32 Ala. 227. Nor can one allege that the other took exclusive possession, and that no assets came into his own hands. *State v. Hyman*, 72 N. C. 22. Where two or more per-

sons are appointed and qualified as executors, and one is guilty of a *devastavit*, after which his co-executors resign, and he executes a new bond, such co-executors are primarily liable for such *devastavit*. *Bostick v. Elliott*, 3 Head. 507. As to the rule where the remaining executor resigns, and one of his sureties is appointed administrator *de bonis non* with the will annexed, and sufficient indemnity is given against the former *devastavit*, see *ib.*

⁶ *Towne v. Ammidown*, 20 Pick. 535; *Brazier v. Clark*, 5 Pick. 96.

⁷ *Marsh v. Harrington*, 18 Vt. 150. And see *Garnett v. Macon*, 6 Call, 308.

Notwithstanding any ulterior liability which one executor or co-administrator

Neither co-executors nor co-administrators, we may add, are compelled to give a joint bond; they may give either separate or joint bonds at their discretion, as the statutes of various States expressly permit; and the effect of giving a separate bond is to leave each co-executor or co-administrator simply liable for his own default or misconduct, under the qualifications set forth in the preceding sections.¹

§ 407. **Rights, Duties, and Liabilities of Administrator with the Will annexed.**—*Secondly*, as to the rights, duties, and liabilities of an administrator with the will annexed. From what has been elsewhere said,² it may be gathered that such rights and duties of an executor as result from the nature of his office must devolve upon an administrator with the will annexed; not, however, an authority necessarily connected with some personal trust and confidence reposed in the executor by the testator.³ A special commission or trust power, conferred by the will upon the executor, does not, in fact, vest in such administrator unless by implication from the language of the will. Thus, a discretionary power to sell lands given to one's executor will not vest in the administrator with the will annexed, whether the executor expressly named died, renounced, or failed, from some reason, to qualify,⁴ or no executor was named at all.⁵ So, where prop-

may have incurred by reason of having executed a joint bond, the fact being that he has not intentionally or otherwise contributed to a *devastavit* by his co-executor or co-administrator, since deceased, equity will take cognizance of his suit against the personal representatives of his deceased associate, founded on the latter's *devastavit*, and make such decree as may be appropriate. *Turner v. Wilkins*, 56 Ala. 173. But it is held that the representatives of one joint executor are not in any form responsible for maladministration of the survivor happening after the decease of the former, notwithstanding a joint and several bond with sureties was given. *Brazier v. Clark*, 5 Pick. 96. And if the survivor neglects to pay over the amount due to a legatee, in conse-

quence of which the sureties pay it, the sureties cannot enforce indemnity or contribution against the personal representatives, heirs, or devisees of the deceased executor. *Towne v. Ammidown*, 20 Pick. 535.

¹ Mass. Pub. Stats. c. 143, § 3.

² *Supra*, § 123.

³ *Farwell v. Jacobs*, 4 Mass. 634; *Bain v. Matteson*, 54 N. Y. 663; *Syme v. Broughton*, 86 N. C. 153.

⁴ *Nicoll v. Scott*, 99 Ill. 529; *Lucas v. Doe*, 4 Ala. 679; *Brown v. Hobson*, 3 A. K. Marsh. 380; *McDonald v. King*, 1 N. J. L. 432; *Conklin v. Egerton*, 21 Wend. 430; 25 Ib. 224; *Belcher v. Belcher*, 11 R. I. 226; *Knight v. Loomis*, 30 Me. 204; *Vardeman v. Ross*, 36 Tex. 111.

⁵ *Hall v. Irwin*, 2 Gilm. 176. There

erty is bequeathed to one's executors, to be held in trust for specified objects, an administrator with the will annexed cannot as such fulfil the trusteeship.¹ Nor has an administrator with the will annexed any right to receive a fund given in personal trust under the will for the support of the testator's widow.² Nor to carry on the testator's business under a testamentary power, where that power appears to have been bestowed upon personal confidence.³ Where, however, a devise is made in trust to the executor named, this need not preclude an administrator with the will annexed from selling the land, under an order of court, for payment of the testator's debts, should a suitable emergency arise; for this is in pursuance simply of administrative functions annexed to the office, and not the person.⁴

Unlike the executor, moreover, an administrator with the will annexed has no authority, as it is held in some States, to administer upon any portion of the estate of the testator not disposed of by the will.⁵

§ 408. **Rights, Duties, and Liabilities of an Administrator de Bonis non.** — *Thirdly*, as to the rights, duties, and liabilities of an administrator *de bonis non*.⁶ Whether administration *de bonis non* is taken upon a testate or intestate estate, there

are local statutes, however, which change this rule more or less specifically. *Hester v. Hester*, 2 Ired. Eq. 330; *Brown v. Armistead*, 6 Rand. 594; *Keefer v. Schwartz*, 47 Penn. St. 503; *Evans v. Blackiston*, 66 Mo. 437. And if the language of the will shows a disposition on the testator's part to permit whomsoever should execute the will to execute the power, the administrator with the will annexed may execute it. *Jones v. Jones*, 2 Dev. Eq. 387. And see 7 Heisk. 315; 32 Cal. 436.

¹ *Brush v. Young*, 28 N. J. L. 237.

² *Warfield v. Brand*, 13 Bush. 77.

³ *Rubottom v. Morrow*, 24 Ind. 202.

⁴ *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497.

⁵ *Harper v. Smith*, 9 Ga. 461; *Syme v. Broughton*, 86 N. C. 153. And see *Owens v. Cowan*, 7 B. Mar. 152; *Mont-*

gomery v. Millikin, Sm. & M. 151; *Moody v. Vandyke*, 4 Binn. 31; *Drayton v. Grimke*, 1 Bailey Eq. 392; *Perry v. Gill*, 2 Humph. 218. But this rule is held inconsistent with the policy of the New York legislation as to such administrators. *Sullivan v. Fosdick*, 17 N. Y. Supr. 173.

An administrator with the will annexed is subject to the provisions of law applicable to other administrators, except so far as the distribution of the estate is directed by the will. *Brown, Ex parte*, 2 Brad. (N. Y.) 22. As to the liability of such administrator and his sureties upon the bond given, see *Murphy v. Carter*, 23 Gratt. 477; *Strother v. Hull*, ib. 652.

⁶ See *supra*, § 128, as to the appointment of such administrators.

is, in respect of powers and responsibility, no essential difference of principle; only that, in the former instance, the administration of the estate becomes completed by one whose scope of authority is that of administrator with the will annexed, and, in the latter, by a simple administrator. The grant of administration *de bonis non* confers upon the person so appointed a legal title to all the goods, chattels, rights, and credits of the deceased, which were left unadministered by his predecessor;¹ and this clearly includes all chattels and chattel rights of the decedent not already disposed of or converted into money by a predecessor, whether of the corporeal or incorporeal kind.

All the personal estate which has not already been administered, but remains capable of identification, belongs to the administrator *de bonis non* specifically. Such property he may recover; and so, too, funds deposited by his predecessor in the name of the estate.² But where the former representative has mingled it with his own property, a conversion — or what is called “administration” — takes place, so that only the value thereof can be recovered, and the administrator *de bonis non* becomes a creditor, with no preference, so to speak, but secured by his predecessor’s official bond.³ An action will not lie at common law against the predecessor for the recovery of assets converted by him; nor, as it is held, has the administrator *de bonis non* any right to call for an account of any part of the estate sold, converted, or wasted by his predecessor, since it is not “unadministered.”⁴ Hence,

¹ Wms. Exrs. 915, 961; Wentw. Off. Ex. 462; 1 Salk. 306; Shackelford v. Runyan, 7 Humph. 141; Kelly v. Kelly, 9 Ala. 908; Paschall v. Davis, 3 Ga. 256; American Board’s Appeal, 27 Conn. 344; Gregory v. Harrison, 4 Fla. 56; Gilbert v. Hardwick, 11 Ga. 599; Newhall v. Turney, 14 Ill. 338; Shawhan v. Loffer, 24 Iowa, 217; Carroll v. Connet, 2 J. J. Marsh. 195; Alexander v. Stewart, 8 Gill & J. 226; Harney v. Dutcher, 15 Mo. 89; Morse v. Clayton, 13 Sm. & M. 373; McMahon v. Allen, 4 E. D. Smith, 519;

Potts v. Smith, 3 Rawle, 361; Bell v. Speight, 11 Humph. 451; Merriam v. Hemmenway, 26 Vt. 565.

² Stair v. York Nat. Bank, 55 Penn. St. 364. And so, too, apparently, with investment securities taken for the estate by his predecessor. King v. Green, 2 Stew. 133. But Saffran v. Kennedy, 7 J. J. Marsh. 188, is *contra*.

³ Beall v. New Mexico, 16 Wall. 535; Wms. Exrs. 916, and Perkins’s note; 34 Ark. 144; 7 Mo. 469.

⁴ Cheatham v. Burfoot, 9 Leigh, 580; Smith v. Carrere, 1 Rich Eq. 123; Stub-

the stricter practice is for the distributees or creditors to the original decedent, or others in interest, and not the administrator *de bonis non* of the estate, to seek an account and to prosecute the representatives of a deceased predecessor in the trust, in respect of his maladministration.¹ This old rule applied literally, however, where the former executor or administrator had died in the office; and modern statutes, not unfrequently, permit of a different rule for other cases, such as removal or resignation of one's predecessor;² and even, as consistency requires, so that the administrator *de bonis non* himself may compel an accounting and delivery of assets as against the personal representatives of a deceased predecessor.³

The unadministered property vests in the administrator *de bonis non* for completing the proper settlement of the estate. A balance due from the predecessor, whether rendered voluntarily by the predecessor himself, or by his representative

blefield *v.* McRaven, 5 Sm. & M. 130; Oldham *v.* Collins, 4 J. J. Marsh. 49.

¹ Beall *v.* New Mexico, 16 Wall. 540; Rowan *v.* Kirkpatrick, 14 Ill. 8; Stose *v.* People, 25 Ill. 600, and cases cited; Wms. Exrs. 539, 915, and Perkins's notes; Johnson *v.* Hogan, 37 Tex. 77; Young *v.* Kimball, 8 Blackf. 167; Thomas *v.* Stanley, 4 Sneed, 411.

² Marsh *v.* People, 15 Ill. 284.

³ Walton *v.* Walton, 4 Abb. (N. Y.) App. 512; Knight *v.* Lasseter, 16 Ga. 151; Tracy *v.* Card, 2 Ohio St. 431; Palmer *v.* Pollock, 26 Minn. 433; Carter *v.* Trueman, 7 Penn. St. 320.

In Wms. Exrs. 539, it is said that if the original administrator were dead, and administration *de bonis non* had been obtained, it was held that such administrator might sue the executors of the deceased administrator at law on the administration bond in the name of the ordinary. But this is denied by Mr. Justice Bradley in Beall *v.* New Mexico, 16 Wall. 540, who states the rule of the English ecclesiastical courts as instead, in effect, that the liability is to the creditors, legatees, and distributees directly,

and not to the administrator *de bonis non*. And he explains Hall, Goods of (1 Hagg. 139), relied upon to support the text in Wms. Exrs. 539, *supra*, as justifying no more than the right of the administrator *de bonis non* to pursue specific assets of the estate, and, if these are refused, instituting a suit on the bond for them. But this, he adds, is perfectly consistent with the doctrine "that for delinquencies and *devastavit* he cannot sue his predecessor or his predecessor's representatives, either directly or on their administration bond." 16 Wall. 541. But *qu.* whether English ecclesiastical courts ever dealt with bonds of a predecessor who had been removed or resigned. See *supra*, § 157. We may conclude that, as to delinquencies of a deceased predecessor, the rule prevails, as stated by Mr. Justice Bradley, where the law has not been changed by statute. Cases cited in this section *supra*; Wms. Exrs. 539, and Perkins's note. And see Gray *v.* Harris, 43 Miss. 421, as to the form of a decree of a balance found against the predecessor on final settlement.

in case of his death, or obtained by a suit on the predecessor's probate bond, belongs by right to the successor as assets, and should be paid into his hands.¹ And it is held that the administrator *de bonis non* should inventory at their just valuation, and account for all chattels belonging to the decedent's estate which his predecessor has not properly sold or disposed of, and which still exist, pursuing them or their value; and such chattels, being a part of the estate which the predecessor has received, and not applied in any manner according to his official duty, he may be charged with their value in an action on his official bond.²

§ 409. **The same Subject.**—The administrator derives title as to the unadministered assets, not from the former executor or administrator, but from the deceased.³ And the occasion which calls for his appointment forces him often into antagonism with his predecessor or his predecessor's representatives, to rescue the estate from maladministration and pursue the remedies available for his predecessor's breach of trust. He may get back personalty of the estate, or its proceeds, wrongfully delivered by the former executor or administrator, and still held as a fund capable of identification.⁴ He may, by proceedings in equity, recover chattels fraudulently and collusively transferred by the predecessor.⁵ He

¹ *Wiggin v. Swett*, 6 Met. 197; *Palmer v. Pollock*, 26 Minn. 433.

² *Fay v. Muzzey*, 15 Gray, 53, 56. And see *Burnley v. Duke*, 2 Rob. (Va.) 102. A balance justly due from the predecessor may be recovered, though used improperly in paying out debts and expenses. *Miller v. Alexander*, 1 Hill Ch. (S. C.) 499. If a deceased representative has disposed of all the property of his decedent, no proceedings can be had to charge it without appointing an administrator *de bonis non*. *Piatt v. St. Clair*, 5 Ohio, 556. See also *supra*, § 128, as to granting such administration for the protection of distributees, etc.

³ *Catherwood v. Chabaud*, 1 B. & C. 154; *Weeks v. Love*, 19 Ala. 25; *Bell*

v. Speight, 11 Humph. 451; *American Board's Appeal*, 27 Conn. 344; *supra*, § 128; *Wms. Exrs.* 961. Each administrator *de bonis non* derives his title from the deceased. *Weeks v. Love*, *supra*.

⁴ *Stevens v. Goodell*, 3 Met. 34; *Fay v. Muzzey*, 13 Gray, 53.

⁵ *Wms. Exrs.* 918, 935; *Cubbridge v. Boatwright*, 1 Russ. Ch. Cas. 549; *Forniquet v. Forstall*, 34 Miss. 87; *Cochran v. Thompson*, 18 Tex. 652. He may likewise maintain a bill in equity, where the estate is insolvent, to have a fraudulent sale of real estate by his predecessor set aside. *Forniquet v. Forstall*, *supra*. But *cf.* *Thompson v. Buckner*, 2 Hill Ch. (S. C.) 499. The South Carolina rule appears to be different.

may demand and sue for assets of the decedent's estate in the hands of a former executor or administrator, or his representative,¹ or in possession of some third party.² He is not estopped by the illegal acts of his predecessor.³ And he may sue the latter, although there are no creditors, and the object of his administration is to protect the rights of heirs and legatees or distributees.⁴ In general, he may institute proceedings, in law or equity, as justice may require, for personal assets which remain unadministered.⁵

An administrator *de bonis non* has the power, and is

Steele *v.* Atkinson, 14 S. C. 154. And it is there held that a fraudulent collusion to misapply assets may be assailed by creditors and distributees, but not by the successor in the trust. *Ib.*

A purchaser not privy to the fraud cannot be thus denuded of his title.

¹ Stair *v.* York Nat. Bank, 55 Penn. St. 364.

² Langford *v.* Mahoney, 4 Dru. & War. 81; Wms. Exrs. 916.

³ Bell *v.* Speight, 11 Humph. 451.

⁴ Scott *v.* Crews, 72 Mo. 261. The next of kin should not sue the representative of the predecessor; but the administrator *de bonis non* should. Ham *v.* Kornegay, 85 N. C. 119. See § 408.

⁵ Wms. Exrs. 916, and Perkins's note. The husband of a sole distributee of the intestate cannot resist a recovery by such administrator on the ground that he has paid all the debts and taken possession of the personal property. Spencer *v.* Rutledge, 11 Ala. 590. Nor can the sole distributee. And see Elliott *v.* Kemp, 7 M. & W. 306.

If an administrator, after his removal from the office, collects money recovered by him as administrator, he may be sued in assumpsit by the administrator *de bonis non*, as for money had and received to the latter's use. Salter *v.* Cain, 7 Ala. 478. Money collected by the former representative's attorney on a demand placed in his hands is not assets to be claimed directly by the new representative, but should be accounted for by the former representative. Sloan

v. Johnson, 14 Sm. & M. 47. Assumpsit does not lie against an administrator *de bonis non*, in his representative character, to recover money received by him from his predecessor, arising from the sale of property belonging to the estate which was exempt from sale. Godbold *v.* Roberts, 20 Ala. 354. An original judgment, not recovered by the predecessor in his representative character, the administrator *de bonis non* cannot sue upon nor treat as assets. Alexander *v.* Raney, 8 Ark. 324. As to recovering a debt which was due from the original representative to the original decedent, see Kelsey *v.* Smith, 2 Miss. 68. At common law an administrator *de bonis non* could not have a *scire facias* upon a judgment obtained by the original executor or administrator. Stat. 17 Car. II. c. 8, § 2, removes this disability in modern English practice; Wms. Exrs. 898, 920; and it does not generally obtain in the United States.

The administrator *de bonis non* should not institute proceedings against widow and heirs of a deceased predecessor, but against the predecessor's personal representative. Finn *v.* Hempstead, 24 Ark. 111. A suit in equity brought by a predecessor deceased may be revived by him. Fletcher *v.* Weir, 7 Dana, 345; Owen *v.* Curzon, 2 Vern. 237; Wms. Exrs. 920. See 2 De G. M. & G. 1. As for proceedings to compel his predecessor to return an inventory, see Gaskins *v.* Hammett, 32 Miss. 103.

subject to the responsibilities, of an original representative, with respect to the estate left unadministered by his predecessor. He may sue on promises made to a predecessor in his representative capacity.¹ The final settling up of the estate devolves upon him; and if the predecessor be dead, the latter's representative should do nothing more than close his dealings, and deliver over such assets as may still be undisposed of, and the balance remaining on a just accounting, to the administrator *de bonis non*.² It is the duty, moreover, of an administrator *de bonis non* to assume the defence of an action brought against his predecessor on a contract of the deceased.³ He may bring a writ of error on a judgment against his predecessor.⁴ He may institute chancery proceedings for foreclosure of a mortgage given to the deceased.⁵ For he is successor to all the legal rights and duties which vested in his predecessor as representative of the estate, so far as may be.

Upon the death of a plaintiff suing as executor or administrator, a revivor should be in the name of the administrator *de bonis non* and not of the plaintiff's own personal representative.⁶ And, in general, an action brought to recover assets by a general executor or administrator, who afterwards dies, resigns, or is removed, may be revived in the name of his successor.⁷

§ 410. **The same Subject; Relation of Administrator *de Bonis non* to his Predecessor's Contracts, etc.**—An administrator *de bonis non* cannot bring suit, as it is held, for

¹ Catherwood *v.* Chabaud, 1 B. & C. 150; Wms. Exrs. 961; Shackelford *v.* Runyan, 7 Humph. 141; Stair *v.* York Nat. Bank, 55 Penn. St. 364.

² Ferebee *v.* Baxter, 12 Ired. 64; Ray *v.* Doughty, 4 Blackf. 115; Steen *v.* Steen, 25 Miss. 513. As to the equity rule requiring the representative of a deceased executor to pay legacies out of funds in his hands, see Tucker *v.* Green, 5 N. J. Eq. 380; Moore *v.* Smith, 5 N. J. Eq. 649; Goodyear *v.* Blood-

good, 1 Barb. Ch. 617; Saunders *v.* Gatlin, 1 Dev. & B. Eq. 86.

³ National Bank *v.* Stanton, 116 Mass. 438.

⁴ Dale *v.* Roosevelt, 8 Cow. 333. And see Graves *v.* Flowers, 51 Ala. 402.

⁵ So, where the mortgagor was the predecessor. Miller *v.* Donaldson, 17 Ohio, 264. And see Brooks *v.* Smyser, 48 Penn. St. 86.

⁶ Brasfield *v.* Cardwell, 7 Lea, 252.

⁷ Russell *v.* Erwin, 41 Ala. 292; State *v.* Murray, 8 Ark. 199.

the price of goods of his decedent sold by a predecessor in office;¹ since this constitutes rather a claim upon such predecessor in connection with striking the balance upon his probate accounts. For loss or injury, moreover, arising out of an agreement made by his predecessor in the line of duty, the remedy, if any, is against the predecessor or his representatives.² But, if the holder and in possession, an administrator *de bonis non* may sue in his own name, as such, on a note given to his predecessor as administrator or executor.³ And where, in connection with a contract made on behalf of the estate, the predecessor takes properly a bond for security, the administrator *de bonis non* may sue for a breach of the bond.⁴ In *assumpsit* brought by the administrator *de bonis non*, the promise may be alleged as having been made to the former executor or administrator.⁵

But the administrator *de bonis non* cannot re-open the transactions which his predecessor has completed in fulfilment of his just authority. While he does not represent his predecessor in the same sense as his predecessor represented the decedent, he is bound by his predecessor's acts so far as they were legal and valid; while, according to the sounder reason, he is bound no further.⁶ He cannot disturb the title of a purchaser acquired under an agreement with his predecessor in office, which the latter was competent to make; and, while in many respects there is no privity between the original representative and an administrator *de bonis non*, the acts and admissions of the former within the sphere of his proper functions are obligatory upon the latter and upon the estate.⁷ And, upon the ground

¹ *Calder v. Pyfer*, 2 Cranch, C. C. 430; *Slaughter v. Froman*, 5 T. B. Mon. 19. And see *Alexander v. Raney*, 8 Ark. 324. But see same section, *post*.

² *Hagthorp v. Neale*, 7 Gill & J. 13.

³ *Barron v. Vandervert*, 13 Ala. 232; *Burrus v. Boulbac*, 2 Bush, 39; *supra*, § 293. Cf. *Brooks v. Mastin*, 69 Mo. 58.

⁴ See *Mathews v. Meek*, 23 Ohio St. 272, where the question arose in con-

nection with executing the trusts under a will.

⁵ *Hirst v. Smith*, 7 T. R. 182; *Wms. Exrs.* 917; *Sullivan v. Holker*, 15 Mass. 374.

⁶ *Forniquet v. Forstall*, 34 Miss. 87; *Cochran v. Thompson*, 18 Tex. 652; *O'Neill v. Abney*, 2 Bailey, 317.

⁷ *Duncan v. Watson*, 28 Miss. 187; *Rice* (S. C.) Ch. 40. The estate comes

of privity, the successor may be compelled to fulfil his predecessor's agreement for a reasonable and *bond fide* sale of chattels;¹ as, likewise, he may sue in respect of promises and contracts made to his predecessor as a representative, where the proceeds will be assets.²

Upon the general principles of equity, it is held that an administrator *de bonis non* will not be permitted to repudiate a just contract of his predecessor without compensating the party injured for all loss induced by the contract.³ And, following the usual rule of administration, such administrator cannot himself contract a debt so as to bind directly his decedent's estate.⁴

How far, too, the administrator *de bonis non* may pursue assets not specifically identified as belonging to the estate, is still a matter of question, except in States whose legislation has defined liberally the powers of an administrator *de bonis non*. Under his commission, such an official was rather circumscribed, according to the earlier precedents. And while equity exercises a broad authority in modern times for tracing out trust funds, and, notwithstanding the want of ear-marks, devoting them to the practical purposes of the trust to which they fairly belonged, a suit instituted at common law pursues a narrower line. Not only the conversion of funds by the predecessor may obstruct his successor, but the strict legal doctrine appears to be, that whenever the property in any of the assets of the deceased has been so changed as to vest in the predecessor, in his individual capacity, the legal title thereto will devolve upon his own executor or administrator at his death, and not upon the administrator *de bonis non*;⁵

to the administrator *de bonis non* subject to a sort of lien in favor of the predecessor to this extent, and operative for his indemnity accordingly. *Supra*, § 260. And see *Teague v. Dendy*, 2 McCord Ch. 207.

¹ *Hirst v. Smith*, 7 T. R. 182.

² *Moseley v. Rendell*, L. R. 6 Q. B. 338; commenting upon *Bolingbroke v. Kerr*, L. R. 1 Ex. 222.

³ *Cock v. Carson*, 38 Tex. 284; *supra*, § 360.

⁴ *McBeth v. Smith*, 1 Const. (S. C.) 676.

⁵ *Drue v. Baylie*, 1 Freem. 462; 3 Keb. 298; *Wms. Extra*. 918; *Harney v. Dutcher*, 15 Mo. 89, and cases cited; *Nicolay v. Fritzchie*, 40 Mo. 69. That equity inclines differently, see 2 Freem. 139; *Skeffington v. Budd*, 3 Y. & Coll. 1; 9 Cl. & Fin. 220, opinions by Lords Cottenham and others.

or, supposing the predecessor to have resigned or been removed, he continues the legal owner until equity interposes to decree the title differently. It is not just to maintain individual ownership by the personal representative in all cases, nor, especially, to allow deposits and securities standing in the name of the trust to be put to paying his individual creditors; and any such conclusion our modern courts of probate and equity, and the legislature besides, will be found to resist.¹ Much of the legal inconsistency to which modern probate law is exposed arises, doubtless, from the doctrine of modern development which charges the personal representative individually and immediately with his own contract on behalf of the estate, instead of the estate itself; the rigid consequence proving sometimes beneficial to the estate and sometimes disastrous. For, wherever the administrator *de bonis non* seeks to recover at law, as assets of the estate, a debt founded upon a legal and individual privity between the debtor and his predecessor, he is obstructed in his common-law remedies.²

§ 411. **Suit on Negotiable Instrument as concerns Administration de Bonis non.**—A note payable to A. B., executor (or administrator) of C. D., is said to be payable to A. B. personally, the words “executor,” etc., being merely descriptive. On the death of A. B., therefore, the suit is properly

¹ See *Stair v. York Nat. Bank*, 55 Penn. St. 364; *King v. Green*, 2 Stew. 133; *Stevens v. Goodell*, 3 Met. 343.

² In *Brooks v. Mastin*, 69 Mo. 58, a recent case, an administrator *de bonis non* undertook to sue upon a debt originally owing the decedent, for which the defendant had delivered his own promissory note in favor of his predecessors “as administrators”; but he could not produce the note. It was held that the plaintiff could not recover on the note without showing that it had come into his possession; nor on the original consideration, without either showing that the note had not been paid to the lawful holder, or else sur-

rendering it for cancellation. And it was further held that where a transaction was the same as if his predecessor had been paid in full what was due the estate, and had re-deposited with the defendant part of the money, the defendant would be legally liable to the predecessor, and the predecessor liable over to the plaintiff, but that there would be no liability as between the defendant and the plaintiff.

It is held that an administrator *de bonis non* is not entitled to the possession of a note given to the former representative as such. *Miller v. Alexander*, 1 Hill Ch. (S. C.) 25.

revived in the name of his personal representative; at all events, if he holds possession, and if there be no averment of assets.¹ But this rule should not interfere with the right of an executor *de bonis non* to receive possession of the unadministered assets of the estate he represents; and, accordingly, such administrator is held capable of suing, as such, upon notes or other evidences of debt payable in terms to his predecessor in the administration, as executor or administrator, provided he make proper averment as to the facts, and produce or account for the instrument.² Where, by general indorsement and delivery, or otherwise, the note became assets payable to bearer, the administrator *de bonis non* is permitted to sue as holder.³ Where, however, the note belonging to the estate was taken in the individual name of the former executor or administrator, or, for other cause, the administrator *de bonis non* cannot produce the instrument as bearer and aver title, an action at law apparently cannot be maintained; for the legal title vests rather in his predecessor's personal representative, on his death. Yet here, on the ground that the administrator *de bonis non* is entitled to the equitable control of the debt and its collection, he may rightfully prosecute his suit in equity.⁴

§ 412. **Administrator de Bonis non bound to observe Good Faith and Prudence, like Other Administrators.**—The administrator *de bonis non* is bound to observe good faith, and to conform to the usual standard of diligence and care, as regards collecting, procuring, and distributing the assets not already administered; but he is no more an insurer of the estate

¹ *Cravens v. Logan*, 7 Ark. 103; *Cook v. Holmes*, 29 Mo. 61; *Arrington v. Hair*, 19 Ala. 243. See *supra*, § 293, as to an original representative's right to sue upon such an instrument.

² *Catherwood v. Chabaud*, 1 B. & C. 150; *Barron v. Vandvert*, 13 Ala. 232. It does not follow that because the administrator *de bonis non* may sue, the representative of the original executor or administrator may not sue. By Lord

Tenterden, in *Catherwood v. Chabaud*, *supra*; Wms. Exrs. 920.

³ *Catherwood v. Chabaud*, 1 B. & C. 150. Here the suit was permitted to be brought by such administrator in his representative capacity. That the bearer may sue in his own name, by virtue of rightful possession, we have already stated in the text.

⁴ *Burrus v. Roulhac*, 2 Bush, 39.

than a general representative.¹ If he faithfully performs his own trust he cannot be made to suffer loss by reason of any predecessor's default; nor is he chargeable for property which, notwithstanding such faithful performance, fails to come into his hands.² The revival of a judgment rendered against the former representative may be made to reach assets in the hands of the successor; but it cannot be made the foundation of a suit against the latter and his sureties as for the successor's waste.³

§ 413. **Administrator de Bonis non with Will annexed.**— Powers and duties vested in the executor, as such, and not personally, generally devolve upon an administrator *de bonis non* with the will annexed,⁴ as well as upon an administrator with the will annexed.

If the predecessor resigns or is removed from office before the final settlement of the estate, and an administrator *de bonis non* with the will annexed is appointed in his place, the latter becomes, immediately upon receiving his credentials, the sole representative of the estate of the deceased, and is entitled to all the assets then in the hands of the former, belonging to the estate; and this, notwithstanding the time of paying moneys to the persons ultimately entitled to receive them has not yet arrived.⁵ But he does not succeed to powers and duties which lie outside the ordinary scope of an executor's functions, unless the testator has clearly granted commensurate authority.⁶

¹ *Supra*, § 315; *Wilkinson v. Hunter*, 37 Ala. 268.

² *Smithers v. Hooper*, 23 Md. 273; *Reyburn v. Ruggles*, 23 Mo. 339; *Weeks v. Love*, 19 Ala. 25. A decree directing property, in the hands of an administrator *de bonis non*, to be taken to satisfy a defalcation of a preceding administrator, is erroneous. *Anderson v. Miller*, 6 J. J. Marsh. 568.

³ *Ruff v. Smith*, 31 Miss. 59.

In some States, under the local code, an administrator *de bonis non* must advertise and hold himself liable for the presentment of claims somewhat as an

original administrator. But, subject to such provisions, if the debts have all been paid, the administrator should be held to an expeditious distribution and winding-up of the estate. See *Alexander v. Stewart*, 8 Gill & J. 226; *Cover v. Cover*, 16 Md. 1.

⁴ *Blake v. Dexter*, 12 Cush. 559.

⁵ *Pinney v. Barnes*, 17 Conn. 420.

⁶ An administrator *de bonis non* with the will annexed is under the same presumed disability as an administrator with the will annexed, as concerns the execution of a personal trust. *Knight v. Loomis*, 30 Me. 204; *Ross v. Barclay*,

§ 414. **Rights, Duties, and Liabilities of Temporary and Special Administrators, etc.**—*Fourthly*, as to temporary and special administrators, what has already been said in connection with their appointment may sufficiently indicate the scope of powers and liabilities pertaining to these several classes of trusts.¹ The general executor or administrator, when qualified, succeeds to the rights of a special administrator;² and, if the latter duly account, and turn over the assets or their proceeds to him, having conducted himself with reasonable discretion and honesty, the courts do not appear inclined to permit third parties, and those who dealt with such temporary official, to take advantage of acts committed by him in excess of his authority.³

§ 415. **Validity of Qualified Representative's Acts does not depend upon his Own Designation of the Office.**—We may add, that, in general, the validity of a personal representative's acts depends on whether they were within the scope of his authority as granted; not on whether he designated himself by one title or another.⁴ And this is a principle available for absolving sureties on the representative's official bond, where the latter takes a fund to which he was not legally entitled in his qualified official character.⁵

§ 416. **Negligence, etc., by Various Representatives in Succession.**—A bill in equity, which includes several successive

18 Penn. St. 179; *Warfield v. Brand*, 13 Bush, 77; *Vardeman v. Ross*, 36 Tex. 111; *supra*, § 128; *Rubottom v. Morrow*, 24 Ind. 202; *Ingle v. Jones*, 9 Wallace, 486. That an administrator *de bonis non* has no concern with property to whose use a legatee for life or next of kin is already specifically entitled, if entitled under the will, see *Place, Re*, 1 Redf. Sur. 276; *Brownlee v. Lockwood*, 20 N. J. Eq. 239. And so, conversely, a direction to executors as executors, and not upon a personal confidence, may be executed by such fiduciary. *King v. Talbert*, 36 Miss. 367; *Olwine's*

Appeal, 4 W. & S. 492. And see *Mathews v. Meek*, 23 Ohio St. 272; *Triggs v. Daniel*, 2 Bibb, 301; *Newsom v. Newsom*, 3 Ired. Eq. 411.

¹ *Supra*, §§ 132–135.

² *Cowles v. Hayes*, 71 N. C. 231.

³ See *Von Schmidt v. Bourn*, 50 Cal. 616; *supra*, § 190.

⁴ Thus, it does not affect the case that one who was only a curator or special administrator, styled himself as a general administrator. *Morgan v. Locke*, 28 La. Ann. 806.

⁵ *Warfield v. Brand*, 13 Bush, 77.

administrators, is not multifarious, in a suit to settle an estate.¹ There may be culpable negligence or misconduct as to assets, so as to charge various representatives in succession.²

¹ Johnson *v.* Molsbee, 5 Lea, 445.

administrator of a surety upon his pre-

² For the rule of determining their decessor's bond may be reached by the respective liabilities in such cases, see suit of the administrator *de bonis non*. Lacy *v.* Stamper, 27 Gratt. 42. The State *v.* Porter, 9 Ind. 342.

PART V.

PAYMENTS AND DISTRIBUTION.

CHAPTER I.

DEBTS AND CLAIMS UPON THE ESTATE.

§ 417. **Executor or Administrator is bound to pay Debts, Claims, etc.** — So far as assets may have reached his hands in due course, every executor or administrator is bound to administer the estate according to law, by paying the debts, claims, and charges upon it, in legal order of preference, before making any distribution. This duty is enjoined upon him by law, by his oath and bond, and by a sound public policy, which treats a decedent's estate as a fund, subject to all lawful debts and demands, and to all reasonable charges incurred by reason of his death. Legatees and distributees, as a rule, are postponed to all such claimants; their satisfaction being out of the surplus, if any, which remains; which surplus, rather than the gross assets, represents the true fortune left by the deceased person; though, as we shall see, priorities exist even as among legatees.¹

Although this winding up of a deceased person's affairs corresponds considerably to the striking of a balance, such as one might have made with his creditors, were he alive, there are essential points of difference: thus, statutes place special limitations to the presentation of claims against the estate of a deceased person; charges, such as those of funeral and administration, and widow's allowances, are here regarded, in addition to what were strictly debts owing by the deceased;

¹ McNair's Appeal, 4 Rawle, 148; Dean v. Portis, 11 Ala. 104; Union McIntosh v. Humbleton, 35 Ga. 95; Bank v. McDonough, 7 La. Ann. 232.

assets are marshalled, moreover, and preferences accorded among debts and charges upon decedent's estate, after a method peculiar to administration. All these points of difference will appear in the course of the present chapter.

But the paramount authority of a statute which establishes an equality among seasonable creditors of the same degree must be respected. No testator can so discriminate of choice among his creditors as to change the legal rules of priority among them in the settlement of his estate; he cannot postpone the debt of higher rank to that of a lower, nor create a preference among debts of equal degree.¹ Nor has the probate court any inherent authority to vary the legal rules of priority.² So, too, the usual consequences of delay and *laches* on the creditor's part, in omitting timely presentment and prosecution of his demand, cannot be averted by general directions in a will, or the order of a probate court;³ though local codes afford equitable relief to the tardy creditor under proper circumstances,⁴ and, saving the priority of seasonable creditors, even a testator might put his creditor on the footing of a specific legatee by apt language in his will.

§ 418. Notice of Appointment; Presentation of Claims; Statutes of Special Limitations. — Statutes in various American States now provide that executors and administrators shall presently give public notice of their appointment, by advertisement or otherwise, within a fixed time. The main object of such legislation is to facilitate the speedy settlement of each deceased person's estate, by raising a legal barrier to claims; for where the public notice has been duly given, the executor or administrator, as such statutes declare explicitly, cannot be held to answer to the suit of any creditor of the deceased after a specified brief period, save so far as

¹ *Turner v. Cox*, 8 Moore, P. C. 288; *Moore v. Ryers*, 65 N. C. 240; *Mason v. Man*, 3 Desau. 16; *People v. Phelps*, 78 Ill. 147.

² *Tompkins v. Weeks*, 26 Cal. 50; *Jenkins v. Jenkins*, 63 Ind. 120; *Thompson v. Taylor*, 71 N. Y. 217.

³ *Collamore v. Wilder*, 9 Kan. 67; 57 Iowa, 353; 72 Ind. 120.

⁴ See *Baldwin v. Dougherty*, 39 Iowa, 50; *Burroughs v. McLain*, 37 Iowa, 189; *Miller v. Harrison*, 34 N. J. Eq. 374; *Winegar v. Newland*, 44 Mich. 367; *Greaves, Re*, 18 Ch. D. 551.

new assets may afterwards have come to hand.¹ In this manner claimants are compelled, regardless of the usual rules of limitation, to present their claims upon the estate within six months, one year, or two or more years, according as the local act may prescribe, or else be barred.²

Statutes of this character may expressly or by inference require the presentation of demands against the estate within the prescribed period. This special barrier operates, notwithstanding an administrator's absence from the State;³ and also as against non-resident as well as resident claimants,⁴ for the policy is to benefit the estate. So, too, it is held that an administrator's promise to pay such barred claim will not make the claim binding upon the decedent's estate, or take

¹ For the computation of time in such cases, see the language of the local statute. *Wooden v. Cowles*, 11 Conn. 292; *Henderson v. Ilsley*, 1 Sm. & M. 9. In Massachusetts, public notice is to be given within three months from the appointment, and the barrier is thus raised in two years. Affidavit of notice is to be filed in the probate registry, as the Massachusetts statute provides; but the fact of due notice may be proved by oral evidence as well. *Henry v. Estey*, 13 Gray, 336. The statute provides for giving the notice afterwards, on order of the court, where by accident or mistake the executor or administrator failed to do so in regular course; in which case the limitation runs from the time of such order. Mass. Gen. Stats. c. 97, §§ 3, 4. See also *Hawkins v. Ridenhour*, 13 Mo. 125; *Dolbeer v. Casey*, 19 Barb. 149; *Lee v. Patrick*, 9 Ired. L. 135. In different States the period of limitations will be found to vary. The form of such notices is usually fixed by statute and standing rules of the probate court; the fact of one's appointment being stated, with a demand upon all persons indebted to make payment, and all persons having claims to present them. *Gilbert v. Little*, 2 Ohio St. 156. The precise time within which claims should be presented need not be explicitly stated. *Ib.*; *May v. Vann*, 15 Fla. 553.

² *Hawkins v. Ridenhour*, 13 Mo. 125; 6 Gill, 430; Mass. Gen. Stats. 697, §§ 1, 2; 9 Ired. L. 135; 44 Conn. 450. In some States the statute requirement is pronounced directory merely. *Hooper v. Bryant*, 3 Verg. 1.

Special administrators, with functions limited to collection, etc., are not liable to actions, and hence need not give notice. *Erwin v. Branch Bank*, 14 Ala. 307. But provision is made that an administrator *de bonis non* shall be liable for two years after qualifying, unless the creditor's action was barred before the previous administration terminated. Mass. Gen. Stats. c. 97, §§ 12, 14.

Provision is made for the case of a creditor of the deceased, whose right of action does not accrue within the two years, where the executor or administrator gives statute notice. Mass. Gen. Stats. c. 97, § 8; *Bacon v. Pomeroy*, 104 Mass. 577; 25 Minn. 22. Except for such saving provisions, an executor or administrator who has given his notice becomes absolved from liability as such at the expiration of the statute period. 6 Cush. 235; 13 Gray, 559. As to a creditor's bill in equity for relief in such cases, see 2 Allen, 445.

³ 6 Ark. 14; 37 Tex. 34; *Lowe v. Jones*, 15 Ala. 545.

⁴ *Erwin v. Turner*, 6 Ark. 14.

it out of the statute.¹ Nor can the claimant who has inexcusably neglected to pursue his claim upon the estate, so as to avoid the barrier, sue legatees, heirs, or kindred in respect of the property they may have derived through the decedent.² In certain States the exhibition of a claim, properly authenticated to the executor or administrator, or a demand upon him, arrests the statute of non-claim;³ or, the local code contemplating a presentment of all claims in the probate court for classification and allowance, a creditor can only be paid out of assets subsequently discovered, unless he duly files his claim against original assets within the period fixed by the statute.⁴ But, generally, the same statute barrier applies as to the time for presenting or suing upon a demand against a decedent's estate.⁵

§ 419. **The same Subject.**—The claims and demands, whose suit or presentation within the statute period are thus contemplated, appear in general to be, all claims that could be asserted against the estate in a court of law or equity, existing at the time of the death of the deceased, or coming into existence at any time after his death, and before the expira-

¹ *Branch Bank v. Hawkins*, 12 Ala. 755; 25 Miss. 501. The executor or administrator is bound to plead such statute. *Supra*, § 389.

² *Cincinnati R. v. Heaston*, 43 Ind. 177; 1. *Bailey Ch.* 437; 12 Iowa, 52. Local statutes provide for admitting later claims which had been deferred with good excuse. *Mass. Gen. Stats.* c. 97; 22 Cal. 95. Excuses are recognized in some other instances. *North v. Walker*, 66 Mo. 453; *Senat v. Findley*, 51 Iowa, 20. And see *Sampson v. Sampson*, 63 Me. 328.

³ 2 *Humph.* 565; 33 Ala. 258; 7 Fla. 301; 29 Ark. 238. The time of subsequent presentment to the probate court for classification is not necessarily limited. *Ib.* An actual presentation of the claim is not always necessary; for, if within the prescribed time the administrator or executor has notice or knowledge of it, this may be shown to

charge him. *Ellis v. Carlisle*, 8 Sm. & M. 552; *Little v. Little*, 36 N. H. 224; 2 Ind. 174; 10 Tex. 197; 9 How. (N. Y.) Pr. 350. But see 58 Ala. 25. Notice to an administrator of the presentment of a demand at the county court may suffice. 24 Mo. 527. See also *Hammett v. Starkweather*, 47 Conn. 439.

⁴ *Russell v. Hubbard*, 59 Ill. 335; 42 Ind. 485; 58 Tenn. 170.

⁵ *Cornes v. Wilkin*, 21 N. Y. 428; 6 Cush. 235. Opportunity to re-open the period is sometimes afforded by statute. 32 Vt. 176.

Statutes of this character may be considered, not as statutes of limitations, but rather as special regulations of probate law which impose the loss of the claim if the party fails to sue on it within the time prescribed. *Standifer v. Hubbard*, 39 Tex. 417. But *cf.* 1 Ired. Eq. 92.

tion of the statute period, including claims running to certain maturity, although not yet payable.¹ The statute barrier has been maintained strenuously against common-law actions brought against the legal representative, which were founded in inchoate and contingent claims, such as dormant warranties and the like, but have not been brought, and could not have been, within the statute period.² Under a bill of equity or legislative proviso, such cases of hardship are sometimes, however, overcome.³ And it is held that these inchoate and contingent claims may be enforced against the heir or distributee, where the claimant is too late to make the executor or administrator liable.⁴ One who seeks to enforce a trust against specific property must seek relief in a court of equity, and can hardly be called a creditor within the meaning of the probate law.⁵ But a debt or note which is secured, as, for instance, by mortgage, ought, in order to be enforced apart from such security, to be thus sued upon or presented.⁶

But such statutes appear confined usually to demands which accrue against the deceased person, so as not to apply to any demands arising by contract, express or implied, with the executor or administrator himself. For claims of the latter sort, a personal representative has notice and opportunity

¹ *Walker v. Byers*, 14 Ark. 246.

² As in *Holden v. Fletcher*, 6 Cush. 235. And see *Bemis v. Bemis*, 13 Gray, 559; *Pico v. De la Guerra*, 18 Cal. 422. An infant's claim is within the statute barrier, or those of others under legal disability. *Williams v. Conrad*, 11 Humph. 412.

³ *Garfield v. Bemis*, 2 Allen, 445.

⁴ *Walker v. Byers*, 14 Ark. 246. See *Selover v. Coe*, 63 N. Y. 438. The Massachusetts statute provides expressly for suit against heirs and next of kin, or devisees and legatees, within one year after the cause of action accrues. Mass. Gen. Stats. c. 97.

⁵ *Gunter v. Janes*, 9 Cal. 643; *Vandever v. Freeman*, 20 Tex. 333.

⁶ *Willis v. Farley*, 24 Cal. 490. A

claim against the estate of a deceased partner is included under the statute. *Fillyan v. Lavery*, 3 Fla. 72.

Under the Massachusetts statute, a creditor whose right of action will not accrue within the period limited for settling the estate, should petition to the probate court, setting forth a statement of his claim; and the court, if it appears that the claim is justly due from the estate, will order the executor or administrator to retain assets sufficient; or a person interested in the estate may give bond, with sureties, to the creditor, for due payment of the claim. Mass. Gen. Stats. c. 97; 128 Mass. 528. See *Brewster v. Kendrick*, 17 Iowa, 479; *Greene v. Dyer*, 32 Me. 460.

to provide, so as to save himself harmless; and these are affected by common rules of limitations.¹

§ 420. **Presentation of Claims; Statute Methods considered.** — Claims upon an estate must be exhibited for allowance as the local statute directs. In many States they should be presented first to the executor or administrator; whose settlement of the same in due season will obviate all further proceedings on the claimant's part; while his refusal or neglect to settle will throw the claimant back upon the usual remedies at law; the probate tribunal passing, not upon individual claims, but only upon the administration account, with its various items; nor in advance of a payment, but after payment has been made.²

But, in some parts of the United States, the probate court exercises a direct supervision in the establishment of individual claims upon a decedent's estate, to a greater or less degree.³ As some local statutes prescribe, the claimant must first present his claim for allowance to the representative, upon whose refusal application may be made to the probate court, with notice to him. In various other States, the practice is for the probate court to allow each separate claim before it is paid.⁴ A probate court does not commonly order allowance, however, in any such sense as to prevent the legal representative from contesting the claim;⁵ nor, in general, so as to impair the validity of the creditor's claim,

¹ *Brown v. Porter*, 7 Humph. 373. See *Ames v. Jackson*, 115 Mass. 508.

These non-claims statutes, together with the local decisions construing them, are very numerous. The practitioner is little interested, however, except in knowing the practice of his own State. For an English statute somewhat corresponding, see Act 22 & 23 Vict. c. 35; 24 W. R. 371.

² *O'Donnell v. Hermann*, 42 Iowa, 60. Statutes require sometimes notice or a demand upon the executor or administrator before suing. 4 Bush, 405; Busb. (N. C.) L. 127.

³ *Hudson v. Breeding*, 7 Ark. 445; 6 Ark. 437.

⁴ *Thayer v. Clark*, 48 Barb. 243; *Danzey v. Swinney*, 7 Tex. 617; 23 Cal. 362; *Dixon v. Buell*, 21 Ill. 203. A court of equity will not assume jurisdiction of a claim in general until the claimant shall have exhibited it and had it allowed in the county court. *Blanchard v. Williamson*, 70 Ill. 647.

⁵ *Magee v. Vedder*, 6 Barb. 352; *Swenson v. Walker*, 3 Tex. 93; *Propst v. Meadows*, 13 Ill. 157; *Scroggs v. Tutt*, 20 Kan. 271.

or his right of action elsewhere.¹ One object of requiring presentment to the probate court is the due classification and record of the admitted demands upon the estate.² The general policy indicated is, that neither the administrator nor the probate court shall have power to settle a claim not authenticated, presented, allowed, and approved, according to the statute. The representative may object to any such claim, and oppose its admission.³ But a claim admitted by the executor or administrator, and thus allowed and classified by the probate court, has, in many States, the dignity and effect of a judgment.⁴

This filing of claims is not an uncommon incident of bankruptcy and insolvency practice; but, with reference to the estate of a decedent which proves insolvent, a statutory course is marked out.

¹ *Branch Bank v. Rhew*, 37 Miss. 110; *Stanford v. Stanford*, 42 Ind. 485; *Rosenthal v. Magee*, 41 Ill. 371. But non-presentment may afford the estate a defence to an action brought against it to recover the demand. *Whitmore v. San Francisco Union*, 50 Cal. 145.

In States where claims are duly filed in court, it is usual for the statute to require that they be authenticated by the affidavit of the creditor before they can be allowed against the estate. The admission of an administrator that the claim is just, or an order for its payment by the probate court, is a sufficient establishment in Indiana. 3 Ind. 504. Whatever is a good defence against a suit on a claim is equally good against its allowance by the probate court. 24 Miss. 173; 2 *Greene (Iowa)* 208. A claim against an estate has no judicial standing in the probate court until it has been allowed and approved; and until it has been rejected, either by the administrator or the probate judge, it has no judicial standing in any other court. 7 Tex. 617.

² Small sums may be paid by the executor or administrator, under some

statutes, without a previous allowance by the court; but such requirements cannot be evaded by splitting a single and entire demand into demands of the excepted amount. *Clawson v. McCune*, 20 Kan. 337. See 2 *Greene (Iowa)* 595.

³ 4 Redf. 490.

⁴ *Tate v. Norton*, 94 U. S. Supr. 746; *Carter v. Engles*, 35 Ark. 205.

Claims of non-resident creditors may be admitted with those of resident creditors under a rule of comity, and with like restrictions. *Findley v. Gidney*, 75 N. C. 395; *Miner v. Austin*, 45 Iowa, 221; *Howard v. Leavell*, 10 Bush, 481.

In New York a decree of the surrogate court establishing the indebtedness of an estate appears to be binding upon the legal representative, and conclusive, both as to the indebtedness and the obligation of the representative to make payment as decreed. *Thayer v. Clark*, 48 Barb. 243. The evidence to sustain a claim need not appear of record; and a probate decree ascertaining and allowing a claim, and ordering the executor or administrator to pay it, is not a technical "judgment" without authority, but a mere ascertainment of its validity and

§ 421. **Funeral Charges and their Priority.** — Funeral charges are not, to speak accurately, debts due from the deceased, but charges which the law, out of decency, imposes upon the estate; and so far as these are reasonable in amount, they take legal priority of all such debts, as, likewise, do the administration charges.¹ A decent burial should comport with the condition of the deceased and the amount of his fortune. Justice to creditors, as well as to one's surviving family, demands, however, that there shall be no extravagant outlay to their loss.² If due regard to the character and social or public standing of the deceased requires a more costly funeral, public or private liberality should defray the additional cost.

The standard of reasonable burial expenses is established by local and contemporary usage; for religious and humane sentiment carries the cost far beyond what mere sanitary rules might prescribe, and that sentiment should not be outraged. In strictness, observed Lord Holt in an early case, no funeral expenses are allowable in an insolvent estate, except for the coffin, ringing the bell, and the fees of the clerk and bearers; pall and ornaments are not included.³ This statement, though inappropriate to our times, suggests that the line is drawn so as to include what is necessary in the sense of giving a Christian burial, excluding the ornamental accompaniments, and provision for mourners and strangers which they might make for themselves. Thus, at the present day, the undertaker's and grave-digger's necessary services should be allowed in addition to those pertaining to the religious exercises; also the cost of a plain coffin or casket, the conveyance of the remains to the grave, and the grave itself; all these being essential to giving the remains a decent funeral. On the

amount, which remains to be satisfied according to law. *Little v. Sinnett*, 7 Iowa, 324. And see *Magraw v. McGlynn*, 26 Cal. 420.

¹ To these, local American statutes add expenses of last illness, as among preferred claims. See *post*.

² 2 Bl. Com. 508; *Wms. Exrs.* 968;

Parker v. Lewis, 2 Dev. L. 21; *Flint-ham's Appeal*, 11 S. & R. 16.

³ *Shelley's Case*, 1 Salk. 296. Burnwell suggests that the expenses of the shroud and digging the grave ought to have been added. 4 Burn Ecc. L. 348, 8th ed. As to a suit of clothes to lay out the deceased in, see 2 Tenn. Ch. 369.

other hand, mutes, weepers, pall-bearers in needless array; carriages for mourners, and especially carriages for casual strangers; floral decorations, refreshments, hired musical performances; and the processional accompaniments of a funeral, — all these, though appropriate, often, to the burial of those who are presumed to have left good estates, are inappropriate to the poor, the lowly, and those whose creditors must virtually pay or contribute to the cost. Public demonstrations which increase the outlay, the attendance of societies to which the deceased belonged, military and civic escorts, and the like, are always properly borne by such bodies or by the public thus gratified, rather than imposed as a charge upon a private estate which cannot readily bear the burden.¹

The religious persuasion of the deceased, or, perhaps, of his immediate family, may be fairly considered in determining the character and items of cost in the funeral; thus, Jewish, Christian, and Pagan usages differ on these points, likewise Catholic and Protestant, nor do all Protestant sects agree among themselves. National habits, and those of one's birthplace, besides, deserve consideration, whatever be the last domicile. The presumption is that the deceased has desired to be buried in accordance with the usages and customs, civil and religious, of the society to which he belonged, and so as to retain its respect.² But the last express wishes of the deceased may well be complied with, in directing the style and character of the funeral, provided these wishes be not extravagant or unreasonable, and no injustice be done to creditors and others in interest;³ and the sanction, too, of one's immediate family is an element of some importance in arrangements so delicate, which necessarily depend more upon the presumed than the actual condition of one's estate.

¹ *Hewett v. Bronson*, 5 Daly, 1; as to the funeral obsequies of a Hindoo *Shaeffer v. Shaeffer*, 54 Md. 679. If testator, 1 Knapp, 245; Wms. Extra. 971. public or benevolent societies defray But a vicious usage cannot be set up. part of the cost, only the excess can be *Shaeffer v. Shaeffer*, 54 Md. 679. charged to the estate. 11 Phila. 135. ² See *Stag v. Punter*, 3 Atk. 119;

³ *Hewett v. Bronson*, 5 Daly, 1. See, *Donald v. McWhorter*, 44 Miss. 102.

Keeping these elements of distinction in view, the standard of allowance for funeral expenses may be often regulated most conveniently by fixing a sum total. Thus, the English practice, prior to Lord Hardwicke's day, was to allow at law only 40s., then £5, and afterwards £10, for the funeral of a deceased insolvent;¹ but English cases, by no means modern, justify the allowance of £20 in such cases.² There are American decisions bearing upon this point.³ The standard varies essentially, however, with the age and locality; as between city and country or polished and simple communities; and, in general, according to the testator's station in life; all this aiding, doubtless, in fixing a scale of prices which, even in such simple items as the cost of a coffin, may vary greatly. Though one should prove to die insolvent, his social condition and apparent means might yet have justified a funeral in accordance with his expectations and those of his kindred; especially, if the personal representative had not reason at the time for suspecting the estate insolvent.⁴ Special circumstances, too, may justify an expenditure unusually great in one or more particulars; as if one's local fame should forbid a funeral strictly private;⁵ or one should die far from home or from his proper burial-place;⁶ though, even here, the limited means at the fair disposal of the executor or administrator should not be transcended in careless disregard of legal claimants, but public or private benefactions should make up the rest.

Items not, perhaps, strictly within the rule of funeral charges, have been allowed from an estate, out of regard to particular circumstances or a decedent's last directions.

¹ Bull. N. P. 143; *Stag v. Punter*, 3 Atk. 119.

² Bayley, J., in *Hancock v. Podmore*, 1 B. & Ad. 260; *Yardley v. Arnold*, 1 C. & M. 434.

³ Where the estate is insolvent, not more than \$200 should be allowed for a funeral. 28 La. Ann. 149. No more than \$300 under any circumstances. 3 MacArthur, 537.

⁴ 3 Atk. 119; *Wms. Exrs.* 969, 970.

⁵ *Prec. Ch.* 261.

⁶ In *Stag v. Punter*, 3 Atk. 119, Lord Hardwicke allowed £60 for the funeral expenses of a testator, dying apparently with a good fortune, who had directed his burial at a place thirty miles distant from the place of his death. See also *Hancock v. Podmore*, 1 B. & Ad. 260.

† Thus a moderate allowance is sometimes made in the executor's or administrator's accounts for the mourning apparel of the widow and children;¹ or even for "mourning rings" distributed among near relatives;² though, in the case of an insolvent estate, especially where the insolvent was a person of no distinction, such charges seem hardly proper.³ And, over carriages used for the immediate family of the deceased, and other incidental charges of trivial amount, vexatious dispute is undesirable;⁴ for, if one dies without leaving the means of paying his creditors, those naturally dependent upon him must needs suffer, too.

Claims founded in the expenses incurred by relatives of the deceased in attending the funeral, their services and time, are not to be favored in settling a decedent's estate; for these are presumably offices of respect and tenderness, gratuitously rendered, and neither purchased nor solicited.⁵ But it may be otherwise where services valuable to the estate are rendered, upon the same occasion, and especially by one not otherwise bound in honor to attend; or where the attendance was at the express request of the dying person; and these, according to circumstances, may be classed among funeral, last illness, or administration charges. Thus, extraordinary cases may arise where the expense of summoning kindred from a distance, or of accompanying the remains to or from some distant point, or of procuring some needful or desired attendance, as for opening the will or examining papers, may properly be allowed in the accounts of an executor or administrator.⁶

In general, allowances for a funeral depend much upon

¹ 2 Cas. temp. Lee, 508; Wood's Estate, 1 Ashm. 314; Holbert, Succession of, 3 La. Ann. 436.

² Paice v. Archbishop of Canterbury, 14 Ves. 364.

³ Johnson v. Baker, 2 C. & P. 207; Flintham's Estate, 11 S. & R. 16.

⁴ Save so far as one surviving spouse may be legally bound to bury the other (see Schoul. Hus. & Wife, §§ 412, 437); a claim might sometimes be set up in connection with providing for a funeral

at a private house, sufficient to furnish a consideration for troublesome special items, of small consequence, which creditors incline to dispute.

⁵ Lund v. Lund, 41 N. H. 355.

⁶ Jennison v. Hapgood, 10 Pick. 77; Mann v. Lawrence, 3 Bradf. Sur. 424; Wall's Appeal, 38 Penn. St. 464. Dinner and horse feed, provided for those attending a funeral, are held improper items for allowance. Shaeffer v. Shaeffer, 54 Md. 679.

whether the estate was insolvent or not, and whether items in the account presented are objected to or not by parties interested. For those entitled to the surplus of an ample estate may all agree to bear the cost of a most extravagant funeral.

§ 422. **Funeral Charges ; Place of Final Interment, Grave-stone, etc.** — Funeral charges, in the literal sense, are always to be incurred in haste, usually without the means of ascertaining the true state of the decedent's fortune or who may rightfully share it, and often at the discretion of some near relative or friend, without sanction from an undisclosed legal representative. But the first funeral charges are not necessarily the last ; and those last, the representative should fix upon with much deliberation. Circumstances may justify a temporary interment, pending the final settlement of the estate.

The purchase of a burial lot or tomb, when, as often happens, the deceased owned none at his death, may thus become a matter for delicate adjustment between one's legal representative and members of his immediate family ; the last having usually the right of selection, and claiming from the estate, in return, what, according to the decedent's condition and circumstances, would be fair remuneration for his own place of final interment, and as to themselves holding the title to the lot or tomb, with the remaining burial rights therein, as statute or the cemetery rules may determine. As to any estate, and an insolvent's estate in particular, there is no legal reason why the executor or administrator should pay in full for land or a tomb in which others than the decedent are to have burial rights ; while it is certain that for his own last resting-place or burial right, a decedent's estate ought to be charged. Provisions relating to the place of burial are frequently made, however, in one's last will ;¹ and directions may thus be given by the general owner as to the use and care of the lot his remains are to occupy. The expense of fencing, preserving, and improving a lot, where others are in-

¹ See *Cool v. Higgings*, 23 N. J. Eq. 308; *Luckey, Re*, 4 Redf. 265.

tered, is not justly chargeable otherwise upon the estate of a particular occupant; while public cemeteries are usually inclosed at the cost of the company or the public.¹ The choice of a burial-place is regulated, to some extent, by the means and condition of the deceased. As to its care, improvement, and preservation, moreover, sole ownership may involve present liabilities whose recompense is to be found in the sale of other burial rights later; nor does the title necessarily vest in the executor or administrator, but rather in a surviving spouse or heirs.

Gravestones or a monument are items of cost allowable to a reasonable amount in the settlement of the estate. Some sort of marker, to identify and protect the remains, seems highly proper in all cases; but, beyond this, the choice takes so wide a range, from the needful to the highly ornamental, that the discretion of the court has often been invoked. The general rule of funeral charges here applies, that no precise sum can be fixed, but the standard must vary with local price and usage, the station in life of the deceased, and the extent of his fortune. Even as against creditors, the expense of a modest gravestone has been allowed; though it is admitted that an estate can be settled in avoidance of such outlay; while it would appear that in some States no gravestone can be charged to an insolvent estate against the consent of creditors.² As to statues and monuments of

¹ Tuttle v. Robinson, 33 N. H. 104; Barclay's Estate, 11 Phila. 123. Statutes regulate this subject to some extent. Ib. §351 is not unreasonable for a burial lot, where the estate amounted to \$13,000. 4 Redf. 265. See 3 Redf. 8.

² See Brackett v. Tillotson, 4 N. H. 208. Such a rule ought not, we think, to be inflexible; but to vary somewhat with circumstances, nor in any case to exclude the cost of a simple marker. Tombstones, in the proportion of about \$30 to an estate of \$3,000, have been allowed in various American cases. Lund v. Lund, 41 N. H. 355; Jennison v. Hapgood, 10 Pick. 77; Fairman's Appeal, 30 Conn. 205; Springsteen v.

Samson, 32 N. Y. 714. In an estate of \$11,096, the executor's allowance for a monument (the residuary legatee opposing) was cut from \$1,455 to half that sum. 4 Redf. 95. An administrator may, on his own contract, render the estate liable for suitable gravestones, and especially if the estate be not insolvent. Ferrin v. Myrick, 41 N. Y. 315; Porter's Estate, 77 Penn. St. 43. And see Mass. Pub. Stats. c. 144, § 6. An expensive monument, however, is hardly to be erected at the sole discretion of a personal representative. Butler, J., lays the rule down quite cautiously on this point in Fairman's Appeal, 30 Conn. 205. And Lund v.

costly design, the executor or administrator ought either to have, besides an ample estate, the explicit directions of the deceased, as his warrant, or the consent of the heirs, or the previous approbation of the probate court; and his safer and more natural course is, in general, to let the family and those interested in the surplus, or nearest to the deceased, fix upon something appropriate in structure, design, and inscription; binding the estate, on his part, only for a reasonable proportion of the cost, if the cost be large, and requiring them to stand responsible for any excess.¹ Where the cost of a monument is to be defrayed by friends of the deceased or the public, a similar mutual consultation and understanding is proper. Monuments and memorials of the deceased, which have no connection with funeral charges or the place of final interment, cannot, of course, be made a burden upon the estate to the detriment of unwilling parties in interest.¹

Lund, 41 N. H. 355, disapproves of the erection of expensive monuments without the previous assent of the heirs, etc.

In general, the cost of erecting a headstone at the grave may be allowed to the representative as "funeral expenses," but only to the extent of providing for a decent burial, according to the amount of the estate. *Owens v. Bloomer*, 21 N. Y. Supr. 296. Nor can a widow of the deceased bind the representative or the estate for a monument erected on her own responsibility and order. *Foley v. Bushway*, 71 Ill. 386.

¹ Where one leaves a good estate, and no children or near kindred, the cost of a handsome monument which the widow desired may be allowed; but pictures of the deceased, and other personal memorials for the gratification of the living, are not properly chargeable to the estate of the dead. *McGlinsey's Appeal*, 14 S. & R. 64. A delicate regard for all those whose pecuniary interests are likely to be diminished by the funeral charges should influence the legal representative; but, at the same time, if the estate be solvent, he

need not permit penurious and unfeeling kindred to rob the deceased of the last decent tributes to his memory. Funeral charges are, by legal intendment, enough for decency and no more; but, by the agreement of those interested, and contributions by them or others, outside of the estate, or (if the estate be ample) under a testator's express directions, the strict legal limit may be far exceeded, and expenses incurred, by way of memorial to the deceased, which have no immediate connection at all with funeral or burial. In *Bainbridge's Appeal*, 97 Penn. St. 482, the court refused to control the discretion of an executor in using the entire residue of the estate, after paying certain legacies, in erecting a monument; such being the testator's direction in his will.

The better opinion is that, the duty thus fairly performed for the benefit of the deceased, the expenses constitute a charge upon his estate so far as they were reasonable and necessary; and that the law implies a promise on the part of the executor or administrator to pay them, so far as the assets suffice for this and the other first preferred charges,

§ 423. **Other Preferred Claims; Administration Charges; Debts of Last Sickness.** — Administration charges rank with those of the funeral in taking a general precedence of creditors' demands. What administration charges should thus be allowed, we shall best consider in a later connection.¹

Statutes in various States rank the necessary expenses of a decedent's last sickness under preferred claims;² though the rule is of modern creation, nor does it to this day obtain in England.³ A physician's services, proper medicines, the attendance of a nurse, may be thus claimed;⁴ and probably, if the last illness occurred in a stranger's house, a reasonable recompense for the use of premises, and injury done to beds

including his own; not, however, to the extent of compelling him to defray them from his private means, where he has disclaimed personal liability and pleads the want of assets. *Wms. Exrs.* 1788; *Tugwell v. Heyman*, 3 Camp. 298; *Hapgood v. Houghton*, 10 Pick. 154; *Patterson v. Patterson*, 59 N. Y. 574, cases cited. See *supra*, § 398. And as to set-off, see 86 N. C. 158. One who, in the absence or neglect of the legal representative, incurs, from the necessity of the case, and pays such expenses, may avail himself of this implied promise for his own reimbursement; and if the expenditure conforms to his reasonable observation of the decedent's property, and with the decedent's apparent condition in life, payment in full is proper, consistently with the other first preferred claims, even though the estate should turn out insolvent. *Patterson v. Patterson*, 59 N. Y. 574; *Rooney, Re*, 3 Redf. (N. Y.) 15; *supra*, § 398.

But for what is not apparently reasonable or necessary, as against the estate, and especially in charges like that of a monument, which may be postponed until the appointment of a legal representative, after the condition of the estate was known, the widow, relative, or stranger cannot bind the estate or its representative upon any such implied promise. *Foley v. Bushway*, 71 Ill. 386;

Samuel v. Thomas, 51 Wis. 549. Rather does the expenditure bind the person who took the responsibility of contracting for it. *Foley v. Bushway*, 71 Ill. 386. That the administrator knew the work was being done, and did not object, is insufficient here to charge him. *Ib.* And see *Lerch v. Emmett*, 44 Ind. 331. And one, like a rich relative or friend, who incurs funeral or burial charges upon his own express undertaking to bear the cost, cannot charge the estate afterwards. See *Coleby v. Coleby*, 12 Jur. N. S. 476.

Before the executor or administrator can be sued on a demand for funeral charges, it is held that he should be notified, within a reasonable time, of the amount due, with proper items. *Ward v. Jones*, Busb. L. 127; *Gregory v. Hooker*, 1 Hawks. 394. A physician's charge for a *post mortem* examination, made on a coroner's inquest, is not a proper claim against the estate. *Smith v. McLaughlin*, 77 Ill. 596. Nor is a charge for medical services rendered to the family of the testate or intestate after his decease. *Johnston v. Morrow*, 28 N. J. Eq. 327.

¹ See *post*, Part VII.

² Mass. Gen. Stats. c. 99, § 1; *Wilson v. Shearer*, 9 Met. 507.

³ *Wms. Exrs.* 968, 988.

and bedding, and under various special circumstances, perhaps, food and personal services; always, however, rating such expenditures according to the place, character, and extent of the last illness, and ranking all together.¹ No precise rule can be laid down as to the duration of one's last illness, nor for the degree of attention paid; this must vary with the nature of the disease and the situation of the patient.¹ Unlike administration and funeral expenses, these are not charges growing out of one's death, but rather debts due from the deceased for services rendered him during his life;² yet a similar necessity may cause them to be rendered independently of one's consent, and a similar policy favors their priority.³

§ 424. **These Preferred Claims rank together; Settlement in Full or Rateably.**—All charges and claims, whether pertaining to funeral or last illness, which are of the same legal degree of preference, are to be paid out on the same footing; and so, we may assume, in advance, as to administration charges. And where the assets are not sufficient to pay all these preferred claims in full, they must with little formality be divided rateably;⁴ for the policy of our law does not favor declaring an estate insolvent, merely for the sake of distributing assets among such claimants.⁵

§ 425. **General Payment of Debts; Rule of Priority.**—We now come to the general payment of debts and demands against an estate. Where the assets are ample for the adjustment of all claims in full, there can be little occasion for closely observing rules of legal priority; this priority denoting, not the time for payment, but the dignity of the claim. When,

¹ *Percival v. McVoy*, Dudley (S. C.) 337; *Huse v. Brown*, 8 Greenl. 167; *Flitner v. Hanley*, 18 Me. 270; *Elliott's Succession*, 31 La. Ann. 31.

² *United States v. Eggleston*, 4 Sawyer (U. S. Cir.) 199.

³ We shall see, hereafter, that the statute allowance to a widow, in various States, may also take precedence of

general debts due from the deceased person's estate, c. 2, *post*.

⁴ See *Bennett v. Ives*, 30 Conn. 329. But these preferred claims appear by some codes to rank in consecutive order. *Hart v. Jewett*, 11 Iowa, 276. And statutes require their timely presentation. See *Elliott's Succession*, 31 La. Ann. 31.

⁵ See *post* as to insolvent estates.

however, a deficiency occurs, and the estate is a slender one, the executor or administrator should regard such rules carefully; for, if he pays an inferior claimant in full, and leaving not enough afterwards to settle all the superior claims which may in due time be presented, he cannot plead a want of assets, but must respond out of his own estate;¹ and so *pro rata* as to other claims of equal dignity, for all such should be paid proportionally alike.

Generally speaking, when the estate of a deceased person proves insolvent or insufficient to meet all the demands presented, it shall, after discharging preferred claims, be applied to the payment of his debts in a prescribed order of classification. If there is not enough to pay the debts of any class, the creditors of that class shall be paid *pro rata*; and no payment shall be made to creditors of any class until all those of the preceding class or classes, of whose claims the executor or administrator has notice, are fully paid.²

§ 426. **Rules of Priority; English Classes enumerated.**— Under the English law, as formerly stated, (1) debts due the crown, by record or specialty, occupy the first class, these taking precedence of all dues to a private subject.³ (2) Next come miscellaneous debts to which particular statutes accord a certain precedence.⁴ (3) To these succeed debts of record; among which judgments or decrees rendered against the deceased are preferred both to recognizances, or penal obligations of record, and the now obsolete securities by statute, which were likewise a sort of bond by record.⁵ (4) Debts by specialty follow, as on bonds, covenants, and other instru-

¹ 2 Bl. Com. 411; Wms. Exrs. 989.

² Mass. Gen. Stats. c. 99; Wms. Exrs. 992; Moore v. Ryers, 65 N. C. 240.

³ Wms. Exrs. 991-993; 2 Inst. 32; Cro. Eliz. 793; 3 Bac. Abr. tit. Exors. I. 2. Probate duties are by statute placed on the footing of debts due to the crown. Act 55 Geo. III. c. 184; Wms. Exrs. 993.

⁴ Wms. Exrs. 994, 995; 6 Ves. 98, 441, 804. Moneys owing the parish by

a deceased functionary, the regimental dues of a deceased officer or soldier, and claims of a "friendly society" on its deceased manager, are among those thus ranked. Ib. From the language of some of these statutes, it might be inferred that not even crown debts shall take precedence. 6 Ves. 99.

⁵ Wms. Exrs. 997-1009, and cases cited; 2 Bl. Com. 341.

ments sealed and delivered; under which head, by construction, a debt for rent is included.¹ (5) Last in order come simple contract debts, or such as are founded in parol or writing, not under seal.²

This enumeration carries the classification to an extreme limit. And to pass over the demands of the second class, which are of a purely arbitrary and exceptional kind, those of the third, fourth, and fifth classes, must needs provoke much controversy. Thus, as to the third class, judgments rendered against the decedent, whether prior in point of time or not, are preferred to recognizances and statutes of that class, and of course to all debts by specialty or simple contract; but the judgment must have been rendered in a court of record;³ and the rank is accorded only to domestic and not to foreign judgments.⁴ In English practice, a judgment which is entered against the decedent after his decease happening between verdict and judgment, shall take priority like a judgment entered during his lifetime; for it is the judgment which was confessed⁵ by the deceased, or obtained by compulsion against him, to which the law assigns superiority.⁶ But, as respects a judgment rendered later, and in fact standing of record against the executor or administrator himself, no such priority applies; for, as between the representative and the creditor, the judgment must be satisfied by the representative out of his own property, if the estate proves insufficient; while, as concerns the estate itself, the creditor stands superior only to others whose claims were of equal degree with that sued upon, by reason of his inferior diligence in prosecuting it.⁶ In order to maintain their priority in the administration of the estate, judgments against the deceased must, in modern practice, be docketed;⁷ while,

¹ 9 Co. 88 b; Wms. Exrs. 1010-1024.

² Bac. Abr. tit. Exors. L. 2; Wms. Exrs. 1025, 1026; 2 Bl. Com. 511.

³ As to what courts are courts of record, see Wms. Exrs. 997, 998; Holt v. Murray, 1 Sim. 485.

⁴ 2 Vern. 540; Walker v. Witter, Dough. 1; Harris v. Saunders, 4 B. & C. 411.

⁵ 5 Co. 28 b; Wms. Exrs. 998, 1740; Burnet v. Holden, 1 Mod. 6; Colesbeck v. Peck, 2 Ld. Raym. 1280.

⁶ Wms. Exrs. 999, 1000; Ashley v. Pocock, 3 Atk. 308.

⁷ See various statutes enumerated in Wms. Exrs. 998-1003; Kemp v. Wadlingham, L. R. 1 Q. B. 355; stat. 23 &

as among themselves, neither the cause of action nor the order of docketing can give one judgment precedence of another.¹ A decree in equity obtained against the deceased, is equivalent to a judgment at law, in respect of priority in the administration ; but not if the decree did not conclusively ascertain a sum actually due, but required an account, or related to some collateral matter, such as foreclosing a mortgage.² As for a recognizance or security by statute, which, though an obligation or bond of record, is postponed to judgments of record and decrees, there must be a record or enrollment in order to place it above specialty debts ; independently of which formality, it should rank among them.³

§ 427. *The same Subject.* — As between specialty and simple contract debts, under the foregoing classification, it is not the mere recital in a deed, but the obligation operating by force of undertakings in an instrument under seal which entitles the specialty debt to priority.⁴ And where one who was bound with the deceased, as surety or co-obligor, pays the bond, his claim upon the estate is held to be only that of a simple contract creditor, inasmuch as the specialty itself has been paid off ;⁵ a legal refinement not commended by American courts, discarded by a late English statute, and

24 Vict. c. 38; *Fuller v. Redman*, 26 Beav. 600.

¹ Wms. Exrs. 1004, 1740; Wentw. Off. Ex. 269, 14th ed. But of several judgment creditors, he who first sues out execution must be preferred, and the executor may elect to whom he shall pay first. Wms. Exrs. 1004.

² Prec. Ch. 79; *Searle v. Lane*, 2 Vern. 89; 3 P. Wms. 401 n.; *Wilson v. Lady Dunsany*, 18 Beav. 299; Wms. Exrs. 1005.

³ *Bothomly v. Fairfax*, 1 P. Wms. 334; Bac. Abr. Execution; Wms. Exrs. 1006-1010.

When two are bound jointly and severally, and upon the death of one the other becomes his executor, the latter may discharge the bond out of the estate of the former ; and it has not

been uncommon in England, when one man is surety for another, for the surety to be constituted executor of the principal, that his indemnity may be the better secured. *Rogers v. Danvers*, 1 Freem. 128. But if the deceased was bound by a purely joint obligation, the survivor alone would continue liable. *Rogers v. Danvers*, 1 Freem. 128; *Richardson v. Horton*, 6 Beav. 185. Equity does not favor such construction, but rather that a joint and several bond was intended.

⁴ *Ivens v. Elwes*, 3 Drew. 25; Wms. Exrs. 1012; *Lacam v. Mertins*, 1 Ves. Sen. 313; *Robinson's Executor's Case*, 6 De G. M. & G. 572.

⁵ *Copis v. Middleton*, 1 Turn. & R. 224; *Priestman v. Tindal*, 24 Beav. 244.

admitted to have no force where the original bond still subsists.¹ A demand founded in a broken covenant, is a specialty debt, whether it be for damages merely, or some specific sum;² and breaches of trust may be similarly regarded when committed by violation of the terms of the sealed instrument,³ though not necessarily when conveyance was made by deed to a trustee without covenant on his part.⁴ Debts by mortgage rank also with specialty debts, where there is a bond or covenant for the payment of money; otherwise, they constitute only a simple contract debt with security.⁵ Debts by specialty, due at some future day, take priority of debts by simple contract, since provision should be made for them; but obligations of indemnity or other contingent debts by specialty, which may never become payable at all, cannot thus obstruct debts actually due of an inferior rank;⁶ though where the contingency happens by breach of the condition, the security will stand like other specialty debts as to assets then existing.⁷ Finally, simple contract debts embrace all which are founded in parol and written engagements not under seal, including sums due on bills and promissory notes, and transactions by word of mouth.⁸

Such was the dissatisfaction in later times upon these preferential distinctions between the specialty and simple contract debts of deceased persons, that Parliament interfered, a few years ago, with an act abolishing all such priorities.⁹

¹ 19 & 20 Vict. c. 97, § 5; Wms. Exrs. 1013, 1014; Ware, *Ex parte*, 5 Rich. Eq. 473; Drake v. Coltraine, Busb. L. 300; Howell v. Reams, 73 N. C. 391; Hodgson v. Shaw, 3 M. & K. 183. The sum due on an administration bond is not a specialty debt due to the administrator *de bonis non*. Parker v. Young, 6 Beav. 261.

² Plumer v. Marchant, 3 Burr. 1380; Broome v. Monck, 10 Ves. 620; Powdrell v. Jones, 2 Sm. & G. 305; Wms. Exrs. 1017.

³ Cas. temp. Talb. 109; Benson v. Benson, 1 P. Wms. 130; Turner v. Wardle, 7 Sim. 80.

⁴ As a rule, it would appear that

breach of trust can constitute no specialty debt, where the trustee has not executed the deed. Wms. Exrs. 1020; Richardson v. Jenkins, 1 Drew. 477.

⁵ 3 Lev. 57; Cro. Eliz. 315.

⁶ See Wms. Exrs. 1022-1025; Atkinson v. Grey, 1 Sm. & G. 577; Collins v. Crouch, 13 Q. B. 542.

⁷ Cox v. Joseph, 5 T. R. 307; Wms. Exrs. 1024; Musson v. May, 3 Ves. & B. 194.

⁸ Wms. Exrs. 1025, 1026.

⁹ See stat. 32 & 33 Vict. c. 46, which places specialty and simple contract creditors on an equal footing as to the estates of all persons dying on and after January 1, 1870; Wms. Exrs. preface,

§ 428. **Rules of Priority ; American Classes enumerated.** — The American rules of priority among claimants, like those relating to the insolvent estates of deceased persons, are fixed by local statutes by no means uniform. But, in most parts of the United States, the disposition has been to reduce the classification of a deceased person's debts to the simplest system possible ; thereby avoiding the close discriminations just noticed. Indeed, we may ascribe in part the new English statute 32 & 33 Vict. c. 46, to the force of American example ; for the general tendency in the United States has long been to rank specialty and simple contract debts (with, perhaps, judgment debts besides) upon one and the same equal footing.¹ Nor do claims for rent appear to have been regarded in this country as entitled to a preferred rank, because of the incident of land tenure alone.² Taxes only have the decided preference accorded in the several States ; these claiming the usual favor of public dues ; and debts entitled to a preference, under the laws of the United States, taking precedence of State taxes.³ Special preferences are seldom favored in our probate legislation.⁴

1011. The priority of judgment creditors, however, is still recognized. *Smith v. Morgan*, L. R. 5 C. P. D. 337. See *Shirreff v. Hastings*, 25 W. R. 842, as to debts under a lease.

¹ 2 Kent Com. 418, 419; cases cited *post*.

² *Cooper v. Felter*, 6 Lans. 485. As to rent due for a pew, see *Johnson v. Corbett*, 11 Paige, 265.

³ Under our federal constitution, the United States has the right to establish uniform laws on the subject of bankruptcies; a right which has been occasionally, but not regularly, exercised. Moreover, the laws of the United States control all State laws as concerns the federal priority. *United States v. Duncan*, 4 McLean, 607; *Beaston v. Farmers' Bank*, 12 Pet. 102. In practice, Congress requires simply that debts due from the deceased to the United States shall first be satisfied, where the estate is insufficient to pay all debts due from

the deceased. This priority of the United States extends of right only to net proceeds, after the necessary charges of administration, etc., have been paid; it is a priority as among creditors. *United States v. Eggleston*, 4 Sawyer, 199. It includes the indebtedness of an indorser. *United States v. Fisher*, 2 Cr. 358. The estate of a deceased surety, on a bond given to the United States, settling with the United States, shall be subrogated to its rights as concerns the estate of the deceased principal. U. S. Rev. Stats. § 3468.

⁴ Thus, the rule, as laid down by the legislature of Massachusetts, contemplates three classes in the following order: (1) Debts entitled to a preference under the laws of the United States; (2) Public rates, taxes, and excise duties; (3) Debts due to all other persons. Mass. Gen. Stats. c. 99. In New York, on the other hand, the system is not so simple, for there are four

The American rule appears to be to consider the rights of creditors as fixed at the debtor's death, according to their due

classes of debts, viz.: (1) Debts entitled to a preference under the laws of the United States; (2) Taxes assessed upon the estate of the deceased previous to his death; (3) Judgments docketed and decrees enrolled against the deceased according to the priority thereof, respectively; (4) All recognizances, bonds, sealed instruments, notes, bills, and unliquidated demands and accounts. 2 N. Y. Rev. Stats. 87, § 27. As to the priority of docketed judgments, etc., under this statute, see *Trust v. Harned*, 4 Bradf. (N. Y.) 213; *Ainslie v. Radcliff*, 7 Paige, 439; *McNulty v. Hurd*, 18 N. Y. Supr. 339. This priority takes effect without reference to any lien of such judgments or decrees upon real estate. *Ainslie v. Radcliff*, ib. The judgment must have been perfected during the life of the debtor. *Mitchell v. Mount*, 31 N. Y. 356. Priority of payment among debts becomes, therefore, in our several States, a matter of local construction as concerns local and independent statutes relating to this subject. See *Hart v. Jewett*, 11 Iowa, 276; *Titterington v. Hooker*, 58 Mo. 593; *Pugh v. Russell*, 27 Gratt. 789.

Debts preferred as "due to the public" do not include debts due to a State bank. *Bank v. Gibbs*, 3 McCord, 377; *Fields v. Wheatley*, 1 Sneed, 351; *Central Bank v. Little*, 11 Ga. 346. Taxes or public dues are in various States accorded a priority so great that they may be sued upon specially, though the estate be pronounced insolvent. *Bulfinch v. Benner*, 64 Me. 404. And see *Bowers v. Williams*, 34 Miss. 324; 2 Vt. 294. But the taxes thus payable are those primarily which the decedent was owing at his death. Later taxes follow the rule of the statute imposing them; but a representative should not pay the assessment upon land which the heir or devisee should discharge; nor encumber personal assets with charges

that do not properly fall upon them, nor the whole personal estate with taxes which concern specific chattels. See *Lucy v. Lucy*, 55 N. H. 9; *Deraismes v. Deraismes*, 72 N. Y. 154.

In various States, the English classification has been more closely followed, under statutes now or formerly in force, though the general policy is that indicated in the text. Hence are found numerous American decisions as to priority, some of which may here be stated for comparison with the English decisions cited under that head.

I. *Judgments*. — Judgment creditors (except for those, as under the New York statute, whose judgments have been docketed against the deceased before his death), in general retain, in this country, the rank that would belong to their several causes of action before judgment. *Lidderdale v. Robinson*, 2 Brock. 159. And by the common law one judgment was not entitled to preference over another if both were docketed at the debtor's death, unless a judgment creditor obtained a preference by proceedings subsequent to such death. *Ainslie v. Radcliff*, 7 Paige, 439. In marshalling assets, a dormant judgment is held to rank with bonds and other obligations in some States. *Williams v. Price*, 21 Ga. 507; *State v. Johnson*, 7 Ired. L. 231. And see *Carnes v. Crandall*, 4 Iowa, 151. The priority of judgments over specialty and simple contract debts was formerly recognized in Kentucky. *Place v. Oldham*, 10 B. Mon. 400. As to the statute preference of "judgments, mortgages, and executions," see *Bomgaux v. Bevan*, *Dudley* (Ga.) 110; *Commissioners v. Greenwood*, 1 Desau. 450. A State may prefer its own judgments to those of other States. *Harness v. Green*, 29 Mo. 316; *Jones v. Boulware*, 39 Tex. 367. Cf. *Gainey v. Sexton*, 29 Mo. 449; *Brown v. Public Administrator*, 2 Bradf.

committed in breach of some sealed instrument, are regarded as simple contract debts ;¹ though, as we have seen, a broken bond or covenant serves as the foundation of a specialty debt.²

§ 430. **Mortgage Debts; Rights of Creditors having Security.** — A mortgage debt, notwithstanding a real estate security, is payable out of the personal assets of the deceased on the usual principles.³ In case the deceased mortgagor was not seized of the mortgaged property at the time of his death, the mortgagee has his choice, either to rely upon such property, or resort to the decedent's estate for payment.⁴ But, where the personal estate of a deceased debtor is distributed among his creditors, it is held that a creditor, who has security upon another fund which is primarily liable, should be compelled to exhaust his remedy against that fund, and come in against the personal estate for the deficiency only.⁵ And an administrator or executor has no right to redeem property for the benefit of the widow, at the cost of an insolvent estate, nor in general to discharge incumbrances by mortgage, pledge,

by the deceased to the real or personal property of another, directs that the damages recovered shall be paid in like order of administration as simple contract debts. Wms. Exrs. 1026. See *Hammond v. Hoffman*, 2 Redf. (N. Y.) 92.

¹ 2 Atk. 119; *Bailey v. Ekins*, 2 Dick. 632; Wms. Exrs. 1018.

² *Supra*, § 427; Cas. temp. Talb. 109. All such claims should be presented according to the usual rules. Halleck, Estate of, 49 Cal. 111. Statutes sometimes give these claims a preference. *Supra*, § 428, n.

³ *Howel v. Price*, 1 P. Wms. 291; *Sutherland v. Harrison*, 86 Ill. 363. But as to exonerating the real estate by the personal, see *post*, Part VI. c. 1.

⁴ *Rogers v. State*, 6 Ind. 31. See *Whitmore v. San Francisco Sav. Union*, 50 Cal. 145. Where real estate mortgaged by the testator will probably be insufficient on foreclosure to pay the mortgage debt, the surrogate or probate

judge may direct the executor or administrator to reserve enough from the assets to meet the deficiency, in the same proportion as for other debts of the same degree. *Williams v. Eaton*, 3 Redf. (N. Y.) 503.

⁵ Thus, where land was sold subject to a mortgage, which the purchaser covenanted to pay or assume, the purchase-money being lessened in amount accordingly, the mortgaged premises should be treated as the primary fund for payment of that debt. *Halsey v. Reed*, 9 Paige, 446. Where the executor or administrator sells property incumbered by a mortgage, the claim of the mortgagee must be satisfied out of the security before the residue can be held for administration expenses, or the claims of general creditors; and only the expenses of the sale take precedence. *Murray, Estate of*, 18 Cal. 686; *Murphy v. Vaughan*, 55 Ga. 361. But *cf.* *Alter v. O'Brien*, 31 La. Ann. 452.

or lien, on his sole responsibility, and without judicial order, where the estate is likely to derive no advantage from the act, but rather the reverse.¹

Lien, mortgage, and pledge creditors, in general, take the full benefit of their security, notwithstanding the death of the debtor; and may apply such security in discharge of their respective claims, under the usual rules and reserving the usual equities. Thus, a solicitor or attorney has a particular lien; so, too, has a bailee for hire, or the workman upon a certain thing,² or a banker for his advances.³

So far as pursuing all such rights against the estate is concerned, modern codes and practice often permit the secured creditor either to realize his security or have it valued; and where he elects to value, he can only prove for the balance of his claim less the valuation.⁴ The security or securities are of course available by way of preference, in accordance with the usual legal doctrines, and the creditor is not obliged to resort to the general assets like general creditors.⁵ If, after realizing upon the security, a balance remains due to the secured creditor, his claim for such balance stands on no better footing than that of unsecured creditors; and, if assets are deficient, he should be paid proportionably with them.⁶ And, in general, claims secured by mortgage, pledge, or lien, are no exception to the rule which requires personal demands to be presented and proved or sued upon, within a specified

¹ *Rossiter v. Cossit*, 15 N. H. 38; *Ashurst v. Ashurst*, 13 Ala. 781; *Shaw, C. J., in Ripley v. Sampson*, 10 Pick. 373. *Supra*, § 318. As to discharging a debt secured by vendor's lien, see *Mullins v. Yarborough*, 44 Tex. 14. And see *Slack v. Emery*, 30 N. J. Eq. 458.

² *Lloyd v. Mason*, 4 Hare, 132; *Schoul. Bailm.* 122-128.

³ *Leonino v. Leonino*, L. R. 10 Ch. D. 460.

⁴ *Williams v. Hopkins*, 29 W. R. 767; *McClure v. Owens*, 32 Ark. 443.

⁵ As among different securities, real and personal, a *pro rata* contribution may be proper in conformity to the contract. *Leonino v. Leonino*, L. R. 10

Ch. D. 460. The duty of the executor or administrator to redeem property of the deceased under mortgage, pledge, or execution, where he has sufficient assets, or else to sell, subject to the incumbrance, is found enforced by legislation, provided there appears to be a valuable interest over and above the incumbrance. *Tuttle v. Robinson*, 33 N. H. 104.

⁶ The rule for such creditors is frequently defined by the local statute. See *Martin v. Curd*, 1 Bush, 327; *Williams v. Hopkins*, *supra*; *Williams v. Eaton*, 3 Redf. (N. Y.) 503; *Moring v. Flanders*, 49 Ga. 594.

time, or else to be barred as against the estate.¹ Collateral security, given by the executor or administrator for a debt due from the deceased, cannot operate so as to place the creditor in a better situation against the estate itself than he was in without such security.²

§ 431. **Invalid or Exorbitant Claims; Voluntary Transactions.**—Claims against the estate, which have no legal validity, must not be paid; and if exorbitant or partially invalid, the executor or administrator should reduce to the proper amount; otherwise his erroneous or excessive payment will amount to a *devastavit*, as against legatees and distributees as well as creditors. A bond debt, founded in immoral consideration, or transgressing the usury laws, or given by one incompetent to contract, comes within this rule.³ And the testator or intestate having died an infant, it is held that his legal representative should not pay a debt, not for necessities, which required one's ratification on attaining majority to render it binding.⁴

Debts, for which the deceased was not in fact liable, do not become obligatory by directions in his will that

¹ *Clark v. Davis*, 32 Mich. 154; *Pitte v. Shipley*, 46 Cal. 154. See *Watt v. White*, 46 Tex. 338. The creditor who probates his claim against the estate is not debarred thereby from proceeding to foreclose his mortgage. *Simms v. Richardson*, 32 Ark. 297. See *Williamson v. Furbush*, 31 Ark. 539.

² *Wyse v. Smith*, 4 Gill & J. 295.

³ 1 Ves. Sen. 254; 18 Ves. 258; *Wms. Exrs.* 1016. A manifestly illegal expenditure cannot be allowed on an accounting. *Burke v. Coolidge*, 35 Ark. 180. Otherwise, as to debts paid honestly, and not carelessly, without knowledge that the consideration was illegal. *Coffee v. Ruffin*, 4 Coldw. 487. And see, as to claims of doubtful legality (which appear to be always a fit subject of compromise), *Parker v. Cowell*, 16 N. H. 149. We may presume that the general principle of probate and equity,

which exempts a representative from the liabilities of extraordinary bailee or insurer (see *supra*, § 315), applies to the payment of claims in modern practice, whether they turn out illegal or not.

⁴ *Smith v. Mayo*, 9 Mass. 62. But see *Schoul. Dom. Rel.* 3d ed., § 402, showing that the privilege of avoiding passes to an infant's representatives and privies in blood, who may either avoid or uphold. See also *Washburn v. Hale*, 10 Pick. 429; *La Rue v. Gilkyson*, 4 Penn. St. 375; *Smith v. McLaughlin*, 77 Ill. 596. If the executor or administrator in good faith pays a claim as allowed by the probate court (in a State where the probate court receives, classifies, and allows), its invalidity cannot be set up against him afterwards. *Owens v. Collinson*, 3 Gill & J. 25.

Of claims barred by limitations we have already spoken. *Supra*, § 389.

"all just debts" should be paid.¹ So, too, though a voluntary bond be good between the parties, yet, in the course of administration, it must be postponed to any just debts, though the latter be due by simple contract.² Gratuitous and voluntary services, rendered the deceased by members of his own family or others, cannot be made the basis of a legal claim against the estate, which the legal representative should recognize; there must have been a mutual intention for recompense either expressed or to be inferred properly from the circumstances and conduct of the parties at the time the services were rendered.³

§ 432. **Claims of Persons disappointed of a Legacy.**—As to persons in general, who perform a service in expectation of a legacy, mere expectation cannot create an enforceable contract; but a mutual understanding that the service would be recompensed by a legacy, may, if shown, afford the basis of a valid claim upon the estate, where the deceased has left no will, or omitted, under his will, to make suitable provision.⁴

— § 433. **Decree or Order for Payment.**—In some States, claims being regularly filed in the probate court for classification and allowance, the judge or surrogate will order payment, or, by decree, establish the classification and indebtedness of the estate, and, acting upon such order in good faith, the representative is protected.⁵ But, except for insolvent estates, the rule elsewhere is, to leave the creditors and legal

¹ *Smith v. Mayo*, 9 Mass. 62; *Mason v. Man*, 3 Desau. 116.

² *Stephens v. Harris*, 6 Ired. Eq. 57.

³ See *Schoul. Hus. & Wife*, § 274, and general works on contracts. And see *Shallcross v. Wright*, 12 Beav. 558.

⁴ *Shakespeare v. Markham*, 17 N. Y. Supr. 311, 322, and cases cited; *Schoul. Dom. Rel.* §§ 238, 274.

Claims of children and near relatives against a parental estate, and claims by a surviving spouse against the estate of another, are discussed in other treatises.

⁵ *Arnold v. Downing*, 11 Barb. 554; *Cossitt v. Biscoe*, 12 Ark. 95; *Wood v. Ellis*, 12 Mo. 616; *Owens v. Collinson*, 3 Gill & J. 25; *Lanier v. Irvine*, 24 Minn. 116; *Johnson v. Von Kettler*, 66 Ill. 63. Where a claim is approved by the administrator, and allowed by the probate court, it cannot be disallowed by collateral proceedings. *Smith v. Downes*, 40 Tex. 57. And see, as to matters of local practice, *Harper v. Stroud*, 41 Tex. 367.

representative to the usual remedies in other courts, or their private arrangements; the probate court confining itself to disputed matters specially referred, and allowing or disallowing the payments charged in the administration account. Even in States where claims are first allowed and approved, the administrator's payment, without a previous order of the court, is held valid, if in itself a proper payment and such as the court would have decreed.¹ Local practice sometimes permits the surrogate or probate court to liquidate demands of an uncertain amount, whether legal or equitable, and order them paid.² The allowance of a claim against the estate of a deceased person, by the probate court, is, at least, a *quasi* judgment, and cannot be collaterally impeached.³

§ 434. **Commissioners or Auditors to examine Claims.**—Commissioners or auditors are sometimes appointed, under local statutes, to examine and report to the probate court concerning claims presented against the estate of a deceased person. The duties of such commissioners, as well as the occasion for appointing them, are set forth at length in the local codes, whose provisions should be carefully followed.⁴

¹ Lockhart v. White, 18 Tex. 102. See Thompson v. Taylor, 71 N. Y. 217.

² Babcock v. Lillis, 4 Bradf. 218.

³ Baker v. Rust, 37 Tex. 242; *supra*, § 420.

⁴ Such commissioners are most frequently appointed where the executor or administrator represents the estate insolvent. In Maine, commissioners are appointed on exorbitant claims. Rogers v. Rogers, 67 Me. 456. And see Buchoz v. Pray, 36 Mich. 429; Boyd v. Lowry, 53 Miss. 352; Commercial Bank v. Slater, 21 Minn. 72; Capehart v. Logan, 20 Minn. 442. Claims must be presented to them within a specified limited time. The report of such commissioners, as to the allowance or rejection of certain claims submitted to them, is usually final, unless appealed from; and claims rejected by them cannot be afterwards used

by set-off or otherwise against the estate. Rogers v. Rogers, 67 Me. 456; Probate Court v. Kent, 49 Vt. 380. And even the probate court has not always a statutory power to accept, reject, or modify their report at discretion. As to notice of the time and place for hearing and examining claims, and the general proceedings of commissioners, *cf.* local statutes; Hall v. Merrill, 67 Me. 112; insolvent estates, *post*. Claims purely of an equitable or contingent character cannot be determined by commissioners. Brown v. Sumner, 31 Vt. 671. And see 51 Vt. 50. But the probate or the "county" court may have jurisdiction of such claims. Hall v. Wilson, 6 Wis. 433. See Clark v. Davis, 32 Mich. 154. The commissioners are not a "court" in the constitutional sense. 40 Mich. 503.

§ 435. **Exhaustion of Assets in paying Superior Claims; Preferences to be observed; Representation of Insolvency.**—An executor or administrator, whose assets are necessarily exhausted in paying debts of the prior class, is bound to plead accordingly when sued on a debt of lower rank; otherwise a sufficiency of assets for both classes is virtually admitted, and he must respond accordingly.¹ And if, upon due opportunity to ascertain the condition of the estate, he believes it to be insolvent, he should so represent to the court and relieve himself of undue responsibility.² But in some States it is distinctly provided, that where the executor or administrator shows by his account in the probate court that the whole estate and assets in his hands have been exhausted in the administration and funeral charges, debts of last illness, and other debts or claims preferred by statute, such settlement shall be a sufficient bar to any action brought against him by a creditor not entitled to such preference, even though the estate has not been represented insolvent.³ It would be *devastavit*, rendering him personally liable for the deficiency, if the executor or administrator gave preference to a debt of lower dignity over those duly presented of a higher; and this rule is the same in law and equity.⁴

§ 436. **Notice of Debts as affecting their Payment with due Preferences; English Rule.**—It is laid down, that an executor or administrator may voluntarily pay a debt of the inferior, before one of a superior sort, of which he had no previous notice; a doctrine, fundamental in character and rational, which keeps tardy creditors from disturbing the settlement, and which obliges all who mean to assert claims upon an

¹ 1 Salk. 310; Wms. Exrs. 989; 2 Bl. Com. 511.

² Newcomb v. Goss, 1 Met. 333. But in modern practice a judicious executor or administrator may generally bring all creditors to accept a *pro rata* allowance, according all due priorities, and so close the estate with less cost and delay.

³ Mass. Gen. Stats. c. 97, § 20.

⁴ Moye v. Albritton, 7 Ired. Eq. 62; Gay v. Lemle, 32 Miss. 309; Huger v. Dawson, 3 Rich. 328; Swift v. Miles, 2 Rich. (S. C.) Eq. 147; People v. Phelps, 78 Ill. 147; Howell v. Reams, 73 N. C. 391. Cf. Miller v. Janney, 15 Mo. 265.

estate to present them in good season.¹ The rule that the executor or administrator must personally respond as for *devastavit*, where he has used up the assets upon inferior debts, applies with this reservation;² for, if he had no notice of the higher debt in question, and was not bound to take notice of it, he must stand excused. Where, too, it is said that debts of superior rank must be pleaded in bar of an action to recover a debt of lower rank, if there are not assets enough for both, or else the representative will be personally bound, a like reservation is to be understood;³ and hence, an executor or administrator may plead, when sued on a debt of the higher rank, judgment recovered without notice thereof on a debt of the lower rank to the exhaustion of assets; for, unless he knew of the higher debt, he could not have prevented a recovery of the lower.⁴ As to debts in general, actual notice must have been received by the executor or administrator, in order to preclude this plea; though, what this notice, the English cases do not clearly determine.⁵ But, of judgments, decrees in equity, and debts due by recognizance and statute, the judicial record is treated as affording constructive notice, which every executor or administrator is bound to regard;⁶ such debts being styled debts of record, and classed accordingly. With the modern extension of the courts and judicial business, this rule must needs impose a perilous responsibility upon the legal representative; but, except for requiring that judgments be docketed in order to afford a constructive notice, English legislation appears to have done nothing to alleviate the burden thus imposed upon the representative.⁷

§ 437. **The same Subject; English Rule as to Equal Creditors; Creditor's Bill, etc.**—Among creditors of equal degree,

¹ 2 Show. 492; *Hawkins v. Day*, 1 Dick. 155; Wms. Exrs. 1029.

² *Supra*, § 425.

³ *Supra*, § 435.

⁴ Bull. N. P. 178; *Sawyer v. Mercer*, 1 T. R. 690; 3 Lev. 114; Wms. Exrs. 1029.

⁵ It is intimated in 1 Mod. 175, that such actual notice must be by suit.

But, by the better authorities, the executor or administrator, however apprised of the existence of a higher debt, cannot safely disregard. Wms. Exrs. 1032; *Oxenham v. Clapp*, 2 B. & Ad. 312.

⁶ Cro. Eliz. 763; *Searle v. Lane*, 2 Freem. 104; Wms. Exrs. 1031, 1032.

⁷ Stat. 4 & 5 W. & M. c. 20; stat. 23 & 24 Vict. c. 38.

the English law has permitted the executor or administrator to pay one in preference to another at his discretion; a privilege to do injustice to others by way perhaps of recompense for the injustice done to himself.¹ This preference may be controlled, however, by proceedings of creditors in the courts. For, as to such creditors of the deceased, a scramble may ensue in the common-law courts; and not he who first commences an action, but he who first recovers a judgment against the executor or administrator, must first be paid. If one such creditor commences the suit, and the legal representative gets notice of it, the latter's right to voluntarily prefer another creditor of equal degree, and then plead *plene administravit*, becomes checked.² Yet the privilege is not wholly lost, for, by baffling this litigant until he has confessed judgment to the suit of another creditor of equal degree, or otherwise aided the other creditor to recover judgment first, the executor or administrator still exercises his right of preference.³ Equity will not interfere with such an election;⁴ nor do the courts of common law preclude his plea *puis darrein continuance*, that judgment was confessed in the latter suit, after he has pleaded the general issue to the former; nor even require that the debt confessed was known to him before this action commenced.⁵ A prior plea, confessing assets to a certain amount, may accord a similar preference.⁶ All that the law appears to insist upon is *bond fide* conduct on the part of the executor or administrator, so that the judgment confessed by him, or the plea confessing assets to a certain amount, shall disclose what is truly owing, or what is the true state of the assets, with reference to the several creditors suing, and the time and circumstances of the several suits.⁷ Where, instead of an action at law, proceedings in equity are commenced against the executor or administrator by a creditor's bill, it is settled in England that

¹ Wms. Exrs. 1033; Lyttleton v. Cross, 3 B. & C. 322.

² Ashley v. Pocock, 3 Atk. 208; Wms. Exrs. 1033, 1034.

³ Vaugh. 95; Lyttleton v. Cross, 3 B. & C. 217; Wms. Exrs. 1034.

⁴ Lepard v. Vernon, 3 Ves. & B. 53; 1 P. Wms. 215.

⁵ Lyttleton v. Cross, 3 B. & C. 322; Prince v. Nicholson, 5 Taunt. 333.

⁶ Waters v. Ogden, 2 Dougl. 453.

⁷ Tolputt v. Wells, 1 M. & S. 395.

a decree of chancery against an executor or administrator is equivalent to a judgment at law against him;¹ whence, it follows, that a decree for payment must take priority of judgments at law later obtained,² and that by suffering such a decree to be entered by bill taken *pro confesso*, the executor or administrator preserves still his right in the courts, of electing to prefer, as among creditors of the same degree.³ But proceedings in equity may be brought in behalf of one creditor, or several, or all; and to correct the manifest injustice of a preference by the representative, such as the common law permitted, modern English practice favors the chancery bill brought once and for all on behalf of all creditors of the deceased, wherever there is likelihood of insolvency, for the purpose of compelling an account and a just and rateable distribution of the assets among all the creditors.⁴ The barrier thus afforded against the preference among claims of equal rank is still, however, an imperfect one; for, contrary to analogy, it is held that even voluntary preference may be made by the executor or administrator pending a decree upon the bill;⁵ while, in accordance with the common-law doctrine, judgments confessed by the representative elsewhere, before the decree is actually entered, take precedence, as of course, among debts of the same rank.⁶ All such preferred payments are accordingly respected when the decree is entered; though as to creditors who have received a partial payment, chancery will make no further pay-

¹ *Morrice v. Bank of England*, Cas. temp. Talb. 217; s. c. 2 Bro. P. C. 465; Wms. Exrs. 1035, 1036.

² Cas. temp. Talb. 217, 223. By injunction equity will enforce obedience to such a decree, and due heed to its precedence in the courts of common law.

³ Cas. temp. Talb. 217, 225.

⁴ *Brady v. Shiel*, 1 Camp. 148; *Jones v. Jukes*, 2 Ves. jr. 518; *Mitchelson v. Piper*, 8 Sim. 64; Wms. Exrs. 1036, 1037.

⁵ Upon this point *Darston v. Lord Oxford*, Prec. Ch. 188, ruled differently, and, as it would seem, more reasonably;

but the decree was reversed on appeal. s. c. Coles, 229. And see *Maltby v. Russell*, 2 Sim. & Stu. 227; Wms. Exrs. 1038; *Radcliffe, Re*, 26 W. R. 417.

⁶ *Larkins v. Paxton*, 2 Beav. 219; *Gilbert v. Hales*, 8 Beav. 236. *Larkins v. Paxton* indicates how full the opportunity might be for carrying out such a preference, and how greatly the estate might leak away, while chancery pursued its tedious processes; for here the creditor's suit was instituted in 1811, the answers were got in about 1820, and no decree was entered until 1829. See Wms. Exrs. 1039. And as to an order *nisi*, see L. R. 8 Ch. D. 154.

ment to them, until all the other creditors are proportionably paid.¹

§ 438. **The same Subject; American Rule.**— There are American cases which support some of the doctrines above stated. Doubtless, in this country, an executor or administrator who pays debts of one class, without notice of other debts entitled to priority, commits no waste, provided that in the time and mode of such payment he transgress no local statute.² In rare instances his legal right to give preference among creditors of equal degree, by confessing a judgment, has been conceded;³ but it is held that such preference is checked by the filing of a creditor's bill in equity.⁴ Constructive notice of a judgment debt, as afforded by the judicial record, is not favored in this country;⁵ nor are chancery proceedings on the creditor's behalf, where action at law opens the readier means of recovering his dues.⁶

But the policy of American legislation is to discourage competition among creditors, and the whole system of voluntary preference; and, under the statutes which require a presentment of claims within a definite period, to the representative or to the court, to fix a date at which debts become absolutely payable from the estate, according to their statute rank, and grant the representative full immunity as to all claims not brought to his notice until afterwards, save as the assets then left may suffice for meeting them.⁷

¹ *Wilson v. Paul*, 8 Sim. 63.

² *Place v. Oldham*, 10 B. Mon. 400; *Mayo v. Bentley*, 4 Call (Va.) 528. Payment, without knowledge of a debt due the United States, is thus justified. *United States v. Ricketts*, 2 Cr. C. C. 553; *Aiken v. Dunlap*, 16 John. 85.

³ *Wilson v. Wilson*, 1 Cranch, C. C. 255; *Gregg v. Boude*, 9 Dana, 343. And equity will not interfere to prevent the representative from giving such preference. *Wilson v. Wilson*, ib. This right of preference is not favored where the representative was interested personally in the debt to which he confesses judgment. *Powell v. Myers*, 1 Dev. & Bat. Eq. 562; next section.

⁴ *Barnawell v. Smith*, 5 Jones Eq. 168; *Overman v. Grier*, 70 N. C. 693.

⁵ A judgment by a justice of the peace, not being of record, requires actual notice. *State v. Johnson*, 7 Ired. L. 231. As to dormant judgments, see *supra*, § 428. Notice of a debt entitled to priority need not be by suit. *Webster v. Hammond*, 3 Har. & M. 131. And in Arkansas a docketed judgment, unless duly presented as a claim, loses its priority. *Keith v. Parks*, 31 Ark. 664.

⁶ *McCoy v. Green*, 3 Johns. Ch. 58; *Walker v. Cheever*, 35 N. H. 347.

⁷ *Supra*, § 420. The Massachusetts statute provides that no executor or ad-

§ 439. **Debt due the Representative from the Estate; Right to retain, etc.** — As part of the English system of preference among equal creditors at an executor's or administrator's discretion, the legal representative has a right to prefer his own debt to all others of equal degree, and to retain assets for it accordingly.¹ This privilege being inequitable, courts of chancery do not allow its assertion in respect of equitable assets, sought by their aid;² though this right of retainer, as regards legal assets, extends to debts which may be due the executor or administrator, either as trustee or as *cestui que trust*, as well as individually, and chancery itself concedes the principle.³ The right does not, however, extend to the gift, bequest, or transfer of other creditors' proved debts.⁴ And there can be no right to retain in an action at law for a demand of which no account can be taken by a jury, and which the other party cannot controvert;⁵ nor on a claim for dam-

ministrator can be held to answer to a suit of a creditor of the deceased, if commenced within one year after he gives bond, unless it is on a demand that would not be affected by the insolvency of the estate, or is brought after the estate has been represented insolvent for the purpose of ascertaining a contested claim. And if, within the year after giving notice of his appointment, he does not have notice of demands against the estate, which will authorize him to represent it insolvent, he may proceed to pay the debts due, without any personal liability on that account to any creditor who shall not have given notice of his claim, although the estate remaining should prove insufficient to pay the whole. Mass. Gen. Stats. c. 97, §§ 16, 17. See *Newcomb v. Goss*, 1 Met. 333; *Tittering v. Hooker*, 58 Mo. 593.

A claim ought to be presented to the executor or administrator in writing, although not positively so required by statute; merely mentioning the approximate amount, etc., is not enough to avoid the barrier. *Pike v. Thorp*, 44 Conn. 450.

Provision is usually made (as suggested *supra*, § 420) by these American statutes for protecting the interests of creditors whose claims will not seasonably accrue, or, under peculiar equitable circumstances, cannot be presented within the period fixed by the statute.

¹ Wms. Exrs. 1039-1050, where this topic is fully considered; cases *infra*. This right of retainer is treated as arising from mere operation of law, and the incongruity that one should sue himself or enter into the strife among equal creditors to procure a prior judgment. ² Bl. Com. 511; 3 Bl. Com. 18; Wms. Exrs. 1039. But the general doctrine of lien, and the maxim that among equals he in possession has the first claim, may likewise be considered the foundation; a doctrine which may be invoked still in aid of administration charges, sums paid and expenses incurred in the trust.

³ 2 Eq. Cas. Abr. 450; 41 L. T. N. S. 672.

⁴ *Plumer v. Marchant*, 3 Burr. 1380; *Cockroft v. Black*, 2 P. Wms. 298.

⁵ *Jones v. Evans*, L. R. 2 Ch. D. 420.

⁶ *Loane v. Casey*, 2 W. Bl. 968; *De*

ages arbitrary in amount, as for a tort. The executor or administrator, it is held, may retain for a debt whose direct suit would be barred by the statute of limitations.¹ But he cannot retain to the prejudice of his co-executor or co-administrator.²

In the United States, if the preference among equal creditors is not favored, still less is that of the executor's or administrator's retainer for his own debt. Confession of judgment, under such circumstances, is viewed with suspicion, nor will the judgment be treated as proof of the debt.³ It is held that the representative cannot retain for his own legacy or distributive share to the detriment of other legatees and distributees similarly entitled.⁴ And, though in a few States the English doctrine of retainer may still prevail,⁵ the better American policy insists that creditors of the same rank shall have equal opportunity. In New York and Missouri, the right of retainer has been expressly abolished.⁶ Other States, in establishing the system of classification and allowance of claims by the probate court, by inference exclude such right.⁷ A Massachusetts statute, to check abuses of this sort, requires further, that, whenever a debt, claimed by the representative as due to himself from the deceased, is disputed by any person interested, the claim shall be stated fully of record, and submitted under directions of the probate court to referees agreed upon by the claimant and the objecting party.⁸ Such a claim, however allowed, must take

Tastet v. Shaw, 1 B. & Ald. 664. Whether the executor, by instituting an administration action on behalf of himself and all other creditors, waives his right of retainer, see *Campbell v. Campbell*, 29 W. R. 233. And see *Richmond v. White*, 27 W. R. 878. The right of retainer is not affected by the later judicature act abolishing the distinction between specialty and simple contract debts. L. R. 16 Ch. D. 368.

¹ *Hopkinson v. Leach*, cited Wms. Exrs. 1049; *Stahlschmidt v. Lett*, 1 Sm. & G. 415.

² 11 Vin. Abr. 72; 9 Mod. 268.

³ *Smith v. Downey*, 3 Ired. Eq. 268; *Finch v. Ragland*, 2 Dev. Ch. 137;

Hubbard v. Hubbard, 16 Ind. 25; *Henderson v. Ayers*, 23 Tex. 96.

⁴ *Gadsden v. Lord*, 1 Desau. 247.

⁵ *Williams v. Purdy*, 6 Paige, 166; *Page v. Patton*, 5 Pet. 303; 2 Dev. & Bat. Ch. 255; *Harrison v. Henderson*, 7 Heisk. 315; 5 Lea, 508; Wms. Exrs. 1039, Am. ed., n. by Perkins; U. S. Dig. 1st series, Executors and Administrators, 3011-3023.

⁶ *Treat v. Fortune*, 2 Bradf. Sur. 116; 6 Thomp. & C. 288; *Nelson v. Russell*, 15 Mo. 356. And see 10 S. C. 354.

⁷ *Wright v. Wright*, 72 Ind. 149; 4 Redf. 263, 499.

⁸ Mass. Gen. Stats, c. 97, §§ 26, 27.

its full or its rateable proportion with those of other creditors.¹

§ 440. **Interest on Claims presented.** — Interest is not allowable from a decedent's estate, where, from the nature of the debt, no interest was due; and the claims of creditors with whom settlement is made in the ordinary course of administration, are usually dealt with on the footing they occupied in this respect at the date of the decedent's death.² Statutes sometimes prescribe a different rule, however, where especial delay arises, as in the settlement of an insolvent estate; and upon a contract with the representative himself, or on the ground of his delinquency, a creditor may claim interest as against him, where he, on his part, cannot bind the estate in return. Bonds, notes, and other instruments, given by the decedent, which expressly bear interest, must, doubtless, be paid according to their tenor.

§ 441. **Mode of paying off Claims; Extinguishment, etc.** — Debts are to be paid in money which is legal tender, or according to the original contract, or as the creditor and representative may mutually agree.³ But, as between the representative and the estate, the prudent interests of the estate must be protected. If the executor or administrator pay off the debts at a discount, he is entitled to a credit only for the

Cf. *Dana v. Prescott*, 1 Mass. 200; *Willey v. Thompson*, 9 Met. 329.

Whether the representative who has a claim against the estate is bound to present it within the time allowed to other creditors, where he retains assets, see *Sanderson v. Sanderson*, 17 Fla. 820. He cannot sue himself at law to recover a debt due to him from the decedent. 11 R. I. 270.

¹ See also *Hubbard v. Hubbard*, 16 Ind. 25; *Henderson v. Ayers*, 23 Tex. 96. As to the presentment of the legal representative's private claim to the judge of probate under New Hampshire statute, see *McLaughlin v. Newton*, 53 N. H. 531. In New York the surrogate has power to pass upon a disputed claim

of an executor or administrator against the estate. *Flood, Matter of*, 16 Abb. (N. Y.) Pr. N. s. 407; 6 *Thomp. & C.* 288; 4 *Redf.* 263.

The right of retainer, for the representative's own debt against the decedent, is to be distinguished from his claim for disbursements and the charges of administration for which he has a lien. See *supra*, § 259; accounts, *post*.

² *Davis v. Wright*, 2 Hill (S. C.) 560; *Durnford, Succession of*, 1 La. Ann. 92. And see 78 Ky. 548.

³ See *Magraw v. McGlynn*, 26 Cal. 420. As to the payment of debts in Confederate money, see *Carruthers v. Corbin*, 38 Ga. 75; *McGar v. Nixon*, 36 Tex. 289; *supra*, § 310.

sums paid;¹ but, in thus procuring a discount, advantages which may prudently be gained for the benefit of the estate, it is proper for him to secure.²

But a promissory note given by an executor or administrator, for a debt of the testator or intestate, is neither a payment nor an extinguishment of such debt; but, at most, it only suspends the right of action on the original debt, until the maturity of such note.³

A creditor, we may add, cannot pay himself by withholding the property of the estate in his possession from the administrator.⁴

§ 442. Personal Liability of Representative for Debts.—An executor or administrator, whose conduct is honest and prudent, and whose course conforms to law, does not become liable, in his private capacity, for debts of the deceased, or charges against the estate, concerning which he entered into no express undertaking. If assets fail to satisfy all claims in due order of preference, and he has used the assets properly, as far as they go, creditors of the estate cannot pursue him farther.⁵

§ 443. Payment, or Advancement, out of Representative's own Funds.—In American practice, an executor or administrator who pays the debts of his testate or intestate, out of his private funds, or advances the money therefor, has usually no right of subrogation to the original creditor, and can acquire no undue advantage over heirs, devisees, and

¹ Heager's Executors, 15 Johns. 65; Miller v. Towles, 4 J. J. Marsh. 255.

² As to paying a bank in its own paper, see Wingate v. Pool, 25 Ill. 118.

³ Taylor v. Perry, 48 Ala. 240. A receipt of sufficient assets to pay his own debt is held an extinguishment of that debt where the doctrine of retainer prevails. 27 Ala. 130; 4 Dev. 103; 2 Hill, 340. But see 7 Heisk. 315.

⁴ Rounfort v. McAlarney, 82 Penn. St. 193. But as to charging against a fund in his hands by way of set-off, see *supra*, § 190.

If a claim against an estate is compromised, the whole benefit should go to the estate. *Supra*, § 330; Wms. Exrs. 1842. An executor or administrator will not be allowed to settle such a claim for less than its face, and appropriate the difference. Cox v. John, 32 Ohio St. 532.

⁵ Eno v. Cornish, Kirby (Conn.) 297; Rucker v. Wadlington, 5 J. J. Marsh. 238; Ritter's Appeal, 23 Penn. St. 95; Orange County v. Kidder, 20 Vt. 519.

others interested in the estate, by doing so.¹ The debt becomes extinguished; and his proper mode of reimbursement is by way of account with the estate. After he shows in the legal manner that there is a balance due him from the estate, upon faithful administration, he has a right to recover or retain it out of the personalty, if there be any left, otherwise out of the land, and thus be reimbursed.²

§ 444. **Recovery of Over-Payment from Creditor.** — Where the executor or administrator has full authority to prefer among equal creditors, as under the English rule, he will have neither right nor occasion to recall his deliberate act.³ But the operation of our American rule is different. Payments made without an order of the probate court, which classifies and allows claims, are in some States irregular; and in States which permit of a specified time for the presentation of claims, the executor or administrator incurs a personal risk if he pays any debt sooner, and if later claims, seasonably presented, show a deficiency of assets. While his own liability is none the less, in such a case, however, it is generally conceded that the excess may be recovered by him from the creditor thus imprudently overpaid; the inference being that only such payment as the estate could really afford was intended by him.⁴

§ 445. **When Heirs or Next of Kin, etc., are liable for Debts of the Deceased.** — Apart from their own personal undertaking, moreover, heirs and next of kin are not to be held liable for debts of a deceased person. Where they, or others in interest, are held responsible at all, the theory is, that the person has received property through the deceased which was fairly subject to the prior incumbrance of his just debts and the usual charges consequent upon his death. Statutes

¹ *Gist v. Cockey*, 7 Har. & J. 135; *McClure v. McClure*, 19 Ind. 185.

² *Blank's Appeal*, 3 Grant (Pa.) 192; *Frary v. Booth*, 37 Vt. 78; *Hill v. Buford*, 9 Mo. 869; *c. post* as to allowances on account. See § 446, *n.*

³ See *Johnson v. Corbett*, 11 Paige, 265.

⁴ *Heard v. Drake*, 4 Gray, 514; *Walker v. Hill*, 17 Mass. 380; *Beatty v. Dufief*, 11 La. Ann. 74. But *cf.* *Lawson v. Hausborough*, 10 B. Mon. 147.

which provide for the enforcement of such inchoate and contingent claims as may accrue after the limited period for settling the estate are framed upon this theory.¹ And, since the personalty constitutes the primary fund for that purpose, no liability can be imposed upon heirs-at-law, by reason of their inheritance, save upon a deficiency of personal assets. The general doctrine is here respected, that one person cannot, against his consent, be rendered liable out of his own means for the indebtedness of another.²

§ 446. Payment of Debts and Claims where the Estate proves Insolvent. — Where the decedent's estate is found insolvent, the legal priorities among claimants should be strictly observed; and special provision is made, both in England and various parts of the United States, for a fair distribution of the estate, under such circumstances.³

¹ See *Walker v. Byers*, 14 Ark. 246; Mass. Gen. Stats. c. 97.

² *Selover v. Coe*, 63 N. Y. 438. For this doctrine, as applied to surviving husband or wife, see Schoul. Hus. & Wife, Part VIII. cs. 1, 3.

³ See *supra*, § 425. Embarrassing questions often arise in dealing with the insolvent estates of deceased persons; but, as statutes of this character are of purely local origin and application, no general exposition of the law appears requisite, beyond what is elsewhere stated of the precedence of claims, the abatement of legacies, marshalling assets, and creditors' bills in chancery.

In modern English practice, the creditor's bill in chancery has become the usual resort for compelling a just distribution of assets among the creditors of a deceased insolvent, as already indicated in the course of the present chapter. Wms. Exrs. 1037; *supra*, § 437. The same course must be pursued in various American States, where chancery jurisdiction prevails, and no statute modifications have been introduced.

In Massachusetts, however, the executor or administrator should seasonably

announce the fact of insolvency to the probate court; and upon such representation (which need not be made if the estate would be used up in paying preferred claims) the probate court appoints commissioners to examine all claims which may be presented. These commissioners appoint times and places of meetings to receive claims, examine claimants, upon oath, if necessary, liquidate and balance all mutual demands, and make due return to the court; six months being the time usually allowed for proof of claims. Upon the basis of their return, the estate is adjusted under direction of the probate court, appeal meanwhile lying, however, on behalf of a dissatisfied creditor, from the decision of commissioners to the temporal courts. The rules of procedure in insolvent estates are fully detailed in the statute, concerning whose interpretation there are numerous decisions. See Mass. Pub. Stats. c. 137; Smith Prob. Law, 3d ed. c. 13.

New York surrogate law provides for an apportionment in case of deficiency; and the method of ascertaining how the *pro rata* dividend shall be decreed by

the surrogate is set forth by the chancery courts. Redfield's Surrogate Practice, 402; Johnson *v.* Corbett, 11 Paige, 265. But a statutory insolvent system appears not to prevail in that State.

The statutes of various New England and Western States adopt substantially the practice of Massachusetts, in relation to insolvent estates, which tend, of course, to relieve the personal representative from much of the responsibility of settlement, in such cases, which the English chancery methods, still retained in many of the older States, still impose upon them. And thus the executor or administrator is not required to determine between allowing a claim against the estate or taking the risk of expensive

litigation in regard to it. A summary and comparatively inexpensive method of adjusting and determining the indebtedness is provided. And instead of employing commissioners, some statutes direct the probate judge himself (at all events in estates below a specified value in assets) to perform the duty of examining and passing upon the claims presented. See *supra*, § 434; Gary's Probate Law (Wisconsin, Michigan, Minnesota, etc.), § 368, *et seq.*

Whether the representative who ignorantly pays a creditor, and then finds the estate insolvent, may prove the debt in the name of the creditor, see 17 Mass. 380; Heard *v.* Drake, 4 Gray, 514; 10 B. Mon. 147.

CHAPTER II.

SPECIAL ALLOWANCES TO WIDOWS AND MINOR CHILDREN.

§ 447. **Wife's Paraphernalia, Separate Property, etc., do not enter into Administration of Husband's Estate.**—The surviving wife's rights should be studied in connection with the law of husband and wife, which is well known to have changed its whole scope and bearing since the common law defined the rules of coverture centuries ago. What have been termed the widow's *paraphernalia*, or the suitable ornaments and wearing apparel of a married woman, remaining at the time of her husband's death, undisposed of by him, exist as hers, by exception to the old rule that all her chattels became her husband's, while all his remained his own.¹ An exception of far wider consequence, under equity decisions and the recent married women's legislation, is that of the wife's separate property.²

§ 448. **Widow's Allowance under Modern Statutes.**—A widow may have rights, by way of distribution or dower, or as a legatee or devisee, in the estate which her husband left at his death. And, furthermore, we are to observe, that as a claimant for the immediate support of herself and the young children of her deceased spouse, modern legislation deals liberally with her. Let us here examine her rights in this latter aspect.

The statutes relating to what is familiarly known as the widow's allowance provide, in general (though with variations of language), that such parts of the personal estate of a person deceased as the probate court, having regard to all the

¹ Schoul. Hus. & Wife, § 431; Com. Dig. Baron & Feme, Paraphernalia. Local statutes in these times sometimes provide expressly that the articles of apparel and ornament of the widow and minor children of a deceased person shall belong to them respectively. Mass. Gen. Stats. c. 96, § 4.

² Schoul. Hus. & Wife, Part V.

circumstances, may allow as necessities to his widow, for herself and family under her care, shall not be taken as assets for the payment of debts, legacies, or even (to follow the expression sometimes inaptly used) charges of administration.¹ The intent of such legislation is to make an express allowance from the husband's estate for the benefit of his widow and minor children, whenever their circumstances require it, treating their immediate necessities as paramount to the claims of creditors. It is to be strictly considered as an allowance out of the decedent's personal property alone, and not extending to real estate;² and, in general, as an allowance to be made whether the husband and father died testate or intestate.³

§ 449. **Widow's Allowance; whether confined to Cases of Distress.** — To relieve immediate distress is the main intent of such legislation; to provide necessities for a widow and young orphans, as far as may be, until the estate is fully settled, or one can make other arrangements for support.⁴ It is not intended to furnish the widow with a capital for business purposes, or to establish a fund from which she may derive a permanent income.⁵ But the allowance, though evidently designed for temporary relief, is not confined to cases of absolute and permanent destitution and slender estates; for a widow who, on a final division of the estate, is likely to receive a considerable competence, may be without the usual means of comfortable livelihood meanwhile; and such cases the judge appears competent to relieve. Indeed, in some States, it is plainly decided that even a rich widow may claim the allowance;⁶ and that the statute provision is of universal application, the discretion of the court extending only to the amount of the provision.⁷ But, according to the better opinion,

¹ Mass. Gen. Stats. c. 96, § 5. And see *Strawn v. Strawn*, 53 Ill. 263; *Sherman v. Sherman*, 21 Ohio St. 631; other cases *infra*; *Sawyer v. Sawyer*, 28 Vt. 245.

² *Paine v. Paulk*, 39 Me. 15; *Hale v. Hale*, 1 Gray, 523. As to advice by the representative, see 75 N. C. 47.

³ See, however, *Mathes v. Bennett*, 1 Fost. 189; Iowa Code.

⁴ *Hollenbeck v. Pixley*, 3 Gray, 521; *Foster v. Foster*, 36 N. H. 437.

⁵ *Ib.*

⁶ *Strawn v. Strawn*, 53 Ill. 263; *Thompson v. Thompson*, 51 Ala. 493.

⁷ *Sawyer v. Sawyer*, 28 Vt. 245.

an allowance may be refused where no good reason is shown for granting it.¹

The language of the local statute is of consequence, however, in determining its scope and purpose; and, in some States, the allowance is so purely for "present support," that it may or may not be treated as part of the widow's share in her husband's estate, according to the court's discretion.² That the allowance is not to be deemed, in any sense, as the judge's gift, or a means of rectifying any apparent injustice to which one may be exposed by the statute of distributions or the testator's will, appears certain.³

§ 450. **Maintenance for a Particular Period sometimes specified.**—The statutes of various southern States provide explicitly for "a year's support," or the maintenance of widow and children for one year out of the deceased husband's estate.⁴ Such an allowance appears to be properly claimed, as such statutes often run, by any widow for the period specified, regardless of her other means of support.⁵ But, in such case, the property actually consumed before the application for support should be taken into account; and where the widow has lived on her deceased husband's estate for a year after his decease, using the property at her discretion, she is entitled to no further allowance.⁶ In lieu of the year's provision, or support, a sum of money may sometimes be awarded.⁷

§ 451. **Precedence of Widow's Allowance over other Claims; whether independent of Distribution, etc.; Effect of Decedent's Insolvency.**—The statute allowance is usually accorded priority over all claims of general creditors; it is sometimes

¹ *Hollenbeck v. Pixley*, 3 Gray, 524; *Kersey v. Bailey*, 52 Me. 199.

² *Foster v. Foster*, 36 N. H. 437; *Mathes v. Bennett*, 1 Fost. (N. H.) 189.

³ *Foster v. Foster*, 36 N. H. 437; *Hollenbeck v. Pixley*, 3 Gray, 525.

⁴ *Cole v. Elfe*, 23 Ga. 235; 61 Ga. 410; 1 Swan, 441; *Rocco v. Cicalla*, 12 Heisk. 508; *Grant v. Hughes*, 82 N. C. 216, 697.

⁵ *Wally v. Wally*, 41 Miss. 657.

⁶ *Blassingame v. Rose*, 34 Ga. 418; 36 Ga. 194. But delay in taking out administration beyond a year from the decedent's death does not necessarily exclude the allowances. *Rogers, Ex parte*, 63 N. C. 110.

⁷ *Nelson v. Smith*, 12 Sm. & M. (Miss.) 662.

preferred even to the expenses of administration and funeral ;¹ though, in practice, a probate court will generally reserve enough for these prior and essential charges.² Judgments and other liens are in some instances regarded as subordinate ; nevertheless, a secured creditor is not to be thus deprived of rights which he can enforce without the aid of an administrator or executor.

As a rule, this immediate allowance is quite independent of one's prospective distributive share, legacy, or provision under a will ;³ but, while a mere advancement would by no means meet all necessitous cases, the court, in some States, may at discretion treat the allowance to a widow as on such a footing ;⁴ which, however, appears contrary to the general policy of such legislation.⁵

According to local statutes as to this allowance, must appear the bearing of the decedent's insolvency. In some States, paying a portion of the assets for the support of the widow and children, when the estate is insolvent, is not justified ; and, certainly, an executor or administrator could not do so, at his own discretion, by way of advancing more than would be theirs on a final settlement.⁶ On the other hand, in States which confide the amount to the discretion of the court, and accord to this allowance an express precedence, insolvency is no barrier ; and it is not uncommon, where the husband has died insolvent, leaving few assets, for the whole of the personal property to be thus awarded to the widow (less, perhaps, the necessary preferred charges), whereby is afforded an expeditious means of settling a small and embarrassed estate.⁷

¹ Mass. Gen. Stats. c. 96, § 5 ; *Kingsbury v. Wilmarth*, 5 Allen, 144.

² *Giddings v. Crosby*, 24 Tex. 295 ; *Elfe v. Cole*, 26 Ga. 197.

³ *Meech v. Weston*, 33 Vt. 561 ; *Foster v. Fifield*, 20 Pick. 67.

⁴ *Mathes v. Bennett*, 1 Fost. (N. H.) 189.

⁵ See *Davis v. Davis*, 63 Ala. 293.

Statutes do not always give the widow's allowance a priority over charges and expenses of administration, funeral, etc. *McCord v. McKinley*, 92 Ill. 11.

And, as to administration, it is certain that, in many instances, unless administration was granted and its expenses paid, there would be no fund available for making the widow's allowance from. Where the personal estate is small, however, it may be awarded to the widow, provided there is real estate which may be sold for the funeral expenses, etc. *McCord v. McKinley*, *supra*.

⁶ *Hieschler, Re*, 13 Iowa, 597.

⁷ *Buffum v. Sparhawk*, 20 N. H. 81 ; *Brazer v. Dean*, 15 Mass. 183 ; *Johnson*

§ 452. **Decree of Allowance, etc., how enforced.**—The allowance to widow and children being duly decreed, the executor or administrator in charge of the estate should make payment accordingly, regarding the statute dignity of the claim, and

v. Corbett, 11 Paige, 265; *Hampson v. Physick*, 24 Ark. 562. And as to "a year's support," see *Elfe v. Cole*, 26 Ga. 197; *Nelson v. Smith*, 12 Sm. & M. 662.

The nature and circumstances of this allowance require that it should be promptly sought. Ordinarily, the application should be made as soon as the inventory of the estate is returned, and the court has the means of judging how much should be granted. *Kingman v. Kingman*, 11 Fost. 182. And it should precede the full administration of the assets. The petition and proceedings for allowance are simple. Notice to the administrator or executor, as one who has knowledge of the actual condition of the estate, who represents claimants, and must pay over the sum decreed, seems always highly proper; and yet, in conformity with the local statute, an *ex parte* proceeding is in some States clearly sanctioned. *Morgan v. Morgan*, 36 Miss. 348; *cf. Wright v. Wright*, 13 Allen, 207. The allowance should be moderate, and according to the fortune of the deceased and the necessities of the petitioner. The amount of the widow's separate property and means, the circumstance that she is accustomed or able to earn her own support or the contrary, the number and respective ages of her children,—all these, as well as the value of the estate, and the prospective distribution, are facts for the court to consider, as material to the case. *Adams v. Adams*, 10 Met. 170; *Hollenbeck v. Pixley*, 3 Gray, 525; *Kersey v. Bailey*, 52 Me. 198; *Duncan v. Eaton*, 17 N. H. 441. The amount suitable by way of reasonable allowance is decreed accordingly at the judge's discretion. Statute sometimes fixes the allowance. *Claudel v. Palao*, 28 La. Ann. 872.

The discretion of the judge of pro-

bate is considered a legal discretion, to be judiciously exercised, and subject (except, perhaps, in extreme instances) to the revision and correction of the supreme court. *Piper v. Piper*, 34 N. H. 563; *Cummings v. Allen*, 34 N. H. 194; *Kersey v. Bailey*, 52 Me. 198. Some statutes give a permissive right to the petitioner, in case the decree of allowance is appealed from, to receive the sum upon furnishing a bond with sureties conditioned to repay the sum if the decree is reversed. Mass. Gen. Stats. c. 94, §§ 9, 10.

The widow may have a second allowance, provided such allowance be just, at any time before the personal estate is exhausted. *Hale v. Hale*, 1 Gray, 518. A periodical allowance may be diminished by the judge on good cause, but not retroactively. *Baker v. Baker*, 51 Wis. 538; 53 Iowa, 467.

An allowance, as it is held, may be granted, although provision was made for the widow by her husband's will in lieu of dower, and accepted by her, and although the executor, being also residuary legatee, has given bond as such to pay the debts and legacies. *Williams v. Williams*, 5 Gray, 24. Nor does the fact that the wife has a separate estate prevent the allowance; at least in States where such estate constitutes in law and equity no fund for the obligatory support of wife and minor children. *Thompson v. Thompson*, 51 Ala. 493; *Wally v. Wally*, 41 Miss. 657. Questions concerning the contribution made by the wife to the marriage, however, the value of her services to her husband, and the like, are not material to the present issue, which is one of actual and present needs, considering the actual personalty left to supply them. *Hollenbeck v. Pixley*, 3 Gray, 525; 10 Met. 170.

charging the sum in his account; otherwise, the claim may be enforced, after a demand and refusal, by action brought by the claimant against such representative;¹ who, if at fault in withholding payment, ought, it seems, to be personally cast for the costs. Payment or delivery having been made in good faith, in accordance with the decree, the executor or administrator is entitled to have credit for the same in his accounts.² A claim against the decedent, purchased after property has vested in the widow by a decree, cannot be set off by a debtor to the estate against the widow's special claim.³

§ 453. **Widow's Allowance, how barred.** — Undue delay in presenting the claim for allowance cannot be permitted, so as to injure those whose rights have become fully fixed, and among whom a disbursement of assets has properly begun.⁴ Misconduct of the wife, such as adultery or desertion, is also made an express bar,⁵ and might, otherwise, be taken into consideration as determining her necessities, while the fact of leaving her husband with apparent justification ought, certainly, not to preclude her allowance.⁶ The acceptance of a distributive share would seem to be inconsistent with the claim for allowance.⁷ Beneficial provisions under a will, which the widow does not renounce, are held, in some instances, to exclude her from claiming the allowance.⁸ But the release of all claims upon her husband's estate, under a marriage contract, is held no bar to a widow's allowance.⁹

¹ *Drew v. Gordon*, 13 Allen, 120; *Godfrey v. Getchell*, 46 Me. 587.

² *Richardson v. Merrill*, 32 Vt. 27.

³ *Haugh v. Seabold*, 15 Ind. 343.

⁴ See *Dease v. Cooper*, 40 Miss. 114; *Kingman v. Kingman*, 11 Fost. 182; *cf. Miller v. Miller*, 82 Ill. 463.

⁵ *Cook v. Sexton*, 79 N. C. 305.

⁶ *Slack v. Slack*, 123 Mass. 423. See 31 La. Ann. 854.

⁷ So the acceptance of a succession. *Claudel v. Palao*, 28 La. Ann. 872.

⁸ *Turner v. Turner*, 30 Miss. 428.

But the widow's appeal from the probate of a will does not estop her from claiming her allowance, independently of that issue. *Meech v. Weston*, 33 Vt. 561. As to a direction in one's will that his family be provided for, etc., see *Reid v. Porter*, 54 Mo. 265; *Riley Ch.* 152.

⁹ *Blackington v. Blackington*, 110 Mass. 461. And see *Sheldon v. Bliss*, 4 Seld. 31; *Phelps v. Phelps*, 72 Ill. 545. But see *Tierman v. Binns*, 92 Penn. St. 248.

§ 454. **Widow's Allowance; Effect of her Death before a Grant.**—So temporary in its nature and so personal in its character is this widow's allowance, that where the widow dies before it is granted, the allowance is lost, even though proceedings relative to the grant are still pending; nor does the right survive or go to her personal representative.¹ The effect of her death, after a decree unappealed from has established her right, absolutely and conclusively, to an allowance, appears, on the other hand, to cause this right of property to pass to her personal representatives.²

§ 455. **Allowance to Minor Children.**—Legislation such as we are considering not only provides, however, that the allowance to the widow shall be for herself and the family under her care, but, in some States makes express allowance to the minor children, in case there is no widow. Under the Massachusetts statute, the allowance to minor children shall not exceed fifty dollars for each child.³ Should the widow's death precede the grant of an allowance, or should there be no widow, an application on behalf of the minor children of the decedent, if there be any, may, therefore, be properly entertained. Statutes authorizing one year's support likewise give the children the right to apply by guardian for the provision, on the death of the widow.⁴ Where minor children do not live with, and are not maintained by, the widow, the probate court may sometimes apportion the provision for the benefit of all concerned.⁵

§ 456. **Specific Articles of Personalty allowed Widow and Children; Exempt Chattels, etc.**—American statutes enumerate specific articles of property, in connection with, or as a substitute, for the money allowance to widow and minor children. Thus, the Massachusetts act excepts from assets

¹ *Adams v. Adams*, 10 Met. 171; *Dunn, Ex parte*, 63 N. C. 137; *Tarbox v. Fisher*, 50 Me. 236. The Ohio rule is to the contrary. *Dorah v. Dorah*, 4 Ohio St. 292; *Bane v. Wick*, 14 Ohio St. 505.

² *Drew v. Gordon*, 13 Allen, 120.

³ Mass. Gen. Stats. c. 96, § 5. And see *Leshner v. Wirth*, 14 Ill. 39.

⁴ *Edwards v. McGee*, 27 Miss. 92.

⁵ *Womack v. Boyd*, 31 Miss. 443.

of the deceased, in addition to this allowance, "such provisions and other articles as are necessary for the reasonable sustenance of his family, and the use of his house and the furniture therein, for forty days after his death."¹ Their own articles of ornament and wearing apparel are expressly confirmed to widow and minor children;² and, under some codes, the widow may take articles of personal property, at their appraised value, to a stated amount.³

In various States, the widow is entitled to all the property of her deceased husband which is exempt by law from sale on execution.⁴ This right appears to exist whether the estate was testate or intestate, solvent or insolvent, and so that the exempt property shall not go to the executor or administrator; but the widow's claim is usually confined to exempt property of her late husband which remained on hand, as a part of his estate, at the time of his death.⁵

All such property going directly to the widow, the representative who converts it is a wrong-doer, and makes himself individually liable;⁶ unless he is required to take a temporary charge of such property, as, for instance, for the purpose of making his inventory.⁷

¹ Mass. Gen. Stats. c. 96, § 5. And see *Carter v. Hinkle*, 13 Ala. 529; *Graves v. Graves*, 10 B. Mon. 41. Expressions for the benefit of minor children are found in such codes.

² Mass. Gen. Stats. c. 96, § 4. See "paraphernalia," Schoul. Hus. & Wife, § 431; *supra*, § 447.

³ *Hastings v. Myers*, 21 Mo. 519; *Bonds v. Allen*, 25 Ga. 343; *Darden v. Reese*, 62 Ala. 311; *Leib v. Wilson*, 51 Ind. 550. Such permission is presumably to take as on account of her share in the estate; but the local statute sometimes extends it to a sort of special gift from the estate.

⁴ *Thompson v. Thompson*, 51 Ala. 493; *Taylor v. Taylor*, 53 Ala. 135; *Whitley v. Stevenson*, 38 Miss. 113; *Pride v. Watson*, 7 Heisk. 232.

⁵ *Johnson v. Henry*, 12 Heisk. 696.

⁶ *Carter v. Hinkle*, 13 Ala. 529;

Morris v. Morris, 9 Heisk. 814. And see, as to "marital portion" to a surviving spouse in necessitous circumstances, *Newman, Succession of*, 27 La. Ann. 593.

As to what the code gives a widow as "head of the family," see *Schaffner v. Grutzmacher*, 6 Iowa, 137; *Paup v. Sylvester*, 22 Iowa, 371.

Statutes recognize the right to receive money in lieu of exempt or other specific articles. *Reavis, Ex parte*, 50 Ala. 210.

⁷ *Voelckner v. Hudson*, 1 Sandf. 215. The administrator cannot pursue such property. *Wilmington v. Sutton*, 6 Iowa, 44.

As to provisions relating to a widow who is "housekeeper" and "head of a family," see 14 Ill. 39; 27 Ill. 129. And as to "implements of industry," see 72 Mo. 656. Specific articles to be

§ 457. **Use of Dwelling House; Widow's Quarantine.** — The Magna Charta of Henry III., which established and defined the rule of dower, made a special provision that the widow might tarry forty days after her husband's death in her husband's house.¹ This latter privilege has since been known as the widow's *quarantine*, and has been expressly recognized by statute in some of the United States, apart from its existence by force of the common law alone;² our legislation tending, moreover, to afford the same shelter to the minor children, and to extend the privilege to the use of the furniture therein, and the consumption of provisions and articles necessary to sustenance.³ In Ohio, it is held that the widow's statute right is not restricted to a personal continuance in the house, and that she may rent or occupy during the statute period, as may best promote her comfort.⁴

set apart to the widow will be found enumerated in certain codes. *York v. York*, 38 Ill. 522; *Brigham v. Bush*, 33 Barb. 596; 1 Sandf. (N. Y.) 215. Pennsylvania statutes provide, after a peculiar expression, as to the retention of exempted chattels for the comfort of the widow and family, and as to property to a certain value. 1 Ashm. 314; U. S. Dig. 1st series, Executors & Administrators, 2712; 91 Penn. St. 34. By Texas statute, allowance should be made, and exempt property set apart, by the court without any request. *Connell v. Chandler*, 11 Tex. 249.

So far as it may be said that the right to specific articles under a statute vests immediately upon the death of the husband, and is not contingent or subject to allotment or grant under the court's direction, the right to these articles, on the widow's death without receiving them, devolves upon her executor or administrator, who may pursue the prop-

erty accordingly. *Hastings v. Myers*, 21 Mo. 519. Such articles come to the wife, not through the husband's will bestowing all of his estate for her support, but by virtue of the statutes. *Vedder v. Saxton*, 46 Barb. 188.

¹ 2 Bl. Com. 135.

² Mass. Gen. Stats. c. 96, §§ 4, 5; 35 Ala. 328; *Whaley v. Whaley*, 50 Mo. 577; *Craige v. Morris*, 25 N. J. Eq. 467; *Calhoun v. Calhoun*, 58 Ga. 247; *Young v. Estes*, 59 Me. 441; *Doane v. Walker*, 101 Ill. 628; 11 Paige, 265.

³ Mass. Gen. Stats. c. 96, §§ 4, 5.

⁴ *Conger v. Atwood*, 28 Ohio St. 134. And if the executor or administrator, in disregard of the widow's right, rents the mansion house, she is entitled to recover the rent received by him during the statute period fixed for her enjoyment of the premises. *Ib.* But, in Massachusetts, absence of the wife from home deprives her of the quarantine. *Fisk v. Cushman*, 6 Cush. 20.

CHAPTER III.

LEGACIES, THEIR NATURE AND INCIDENTS.

§ 458. **This Subject a Branch of the Law of Wills.**—The subject of legacies is, properly speaking, a branch of the law of wills; and, to general treatises on wills, the reader is referred for a detailed treatment of the subject.¹ Many intricate problems arise in the equity courts under this head, which an executor or administrator, as such, may never be required to solve; but, where embarrassment arises in the interpretation of a testamentary trust, they who administer that trust, whether trustees or executors, must seek competent legal advice. The plain directions of a well-drawn and simple will are to be pursued according to the testator's manifest wishes, and after a plain and common-sense fashion; and even the close and subtle analysis which acute judicial minds have given to the most complicated of testamentary provisions, proceeds, after all, upon the common-sense principle that the testator's just intentions should, if possible, prevail.

It may be advantageous, however, to set before the reader the nature of legacies and their chief incidents; for, to this extent, at least, every executor should make himself familiar with this interesting topic of our jurisprudence.

§ 459. **Legacy defined; Executor under a Will should pay or deliver.**—A legacy is a gift or disposition in one's favor by a last will. We commonly apply the word to money or other chattel gifts, though a broader reference is not inappropriate; "bequest" being the more precise term for a testamentary gift of personalty.² Next to seeing that all just

¹ See latest editions of the works of Jarman and Redfield on wills. given or left, either by a testator in his testament wherein an executor is ap-

² A legacy is defined by Godolphin as "some particular thing or things pointed, to be paid or performed by his executor, or by an intestate in a codicil

debts and charges are amply provided for, one who administers under a will should attend to the payment or delivery of legacies in accordance with law and the last wishes of his testator.

While, by "legacy," our law signifies a testamentary disposition; and every testamentary disposition is admitted to be ambulatory, and revocable, by the testator during the testator's natural life; it does not follow that a legacy is necessarily devoid of consideration.¹

§ 460. **Description of the Legatee, and who may be such.** — Various classes of persons have been treated as disqualified from receiving legacies under English statutes; the list being quite similar to that which pertains to the office of executor.² Prohibited classes, however, must be defined by law;³ for

or last will, wherein no executor is appointed, to be paid or performed by an administrator." Godolph. pt. 3, c. 1, § 1, cited Wms. Exrs. 1051.

¹ 3 Abb. App. 411.

² *Supra*, § 35.

³ The fundamental terms of its creation are, as to every corporation, properly resorted to for determining its legal capacity to take, as legatee or devisee; the main difficulty being to adjust the weight of presumptions properly where those terms have not been clearly expressed. It is not essential that the corporate organization be complete or final when the testamentary provision takes effect; but associations clearly identified, may, like two or more persons, stand entitled to a bequest; and such association may procure afterwards an act of incorporation from the legislature in confirmation of its right. *Nye v. Bartlett*, 4 Met. 378; *Zimmerman v. Anders*, 6 W. & S. 218; *England v. Prince George's Vestry*, 53 Md. 466. So, too, a corporation named as legatee or devisee not unfrequently resorts to the legislature, after the death of the testator, but before the money is payable, to procure such amendment of its charter as may clearly

remove all restraint upon its capacity to take the benefits of the will in question. See Wms. Exrs. 1052, Perkins's note. A corporation's right to take by will is subject to the general laws of the State passed after the incorporation. *Kerr v. Dougherty*, 79 N. Y. 327. And see *England v. Parish Vestry*, 53 Md. 466.

Corporations, public or private, are not so readily presumed capable of taking lands under a will as personal property; the rule of policy is different in the two instances, and the law of *situs* prevails as to land. It is held, in construction of the New York statute, that a devise of lands in New York to the government of the United States is void. *United States v. Fox*, 94 U. S. Supr. 315; *Fox, Matter of*, 52 N. Y. 530. But the bequest to the United States, whence was derived the Smithsonian Institution, was sustained in the English chancery courts, this being a bequest of personal property. The New York statute provides that a devise of lands in that State can only be made to natural persons, and to such corporations as are created under the laws of that State, and are authorized to take by devise.

every person is capable of taking a legacy, as a rule, excepting such as are thus expressly forbidden.¹

§ 461. **Subject-Matter of Legacies; Specific distinguished from General Legacies.** — All legacies are either *general* or *specific*. A general legacy is one which does not necessitate delivering any particular thing or paying money out of any particular portion of the estate. But a specific legacy is the converse of this; or where a particular thing must be delivered, according to the terms of the bequest, or money paid out of some particular portion of the estate.²

Thus, if a testator bequeaths to A. a horse or a gold ring, this indefinite expression constitutes a general legacy; for we may infer that the executor is left free to procure something which shall answer that description out of the funds in his hands, provided none be left at the testator's decease. But, if the bequest is expressed, "my roan horse," "the gold ring which C. D. gave me," or (with reference, not to a present possession, but possession at the time of one's decease) "whatever horses shall be in my stable," or "all the books

¹ 1 Roper Legacies, 28; 2 Redf. Wills, 2d ed. 3; Wms. Exrs. 7th ed. 1052. Among those formerly disqualified at English law were those who denied the Scriptures, traitors, and artificers going abroad. Such disqualifications have no application to the United States, and the modern sense condemns them.

In England, it was decided (2 Stra. 1253) that a subscribing witness, who derived any legacy under the will for himself or his wife, was thereby rendered incompetent by reason of interest, and that the will must consequently fail unless there appeared the requisite number of witnesses without him. Statute 25 Geo. II. c. 6, however, preserved the competency of the subscribing witness by declaring his legacy void; and similar acts have been passed in most American States. Wms. Exrs. 1053; 2 Redf. Wills, 4. See also stat. 1 Vict. c. 26, § 15.

As to aliens, infants, insane persons and married women, modern law and practice favors their right to become legatees. 2 Redf. Wills, 5; 1 Jarm. Wills, 3d Eng. ed. 70; Wms. Exrs. 1054.

² 2 Redf. Wills, 131; 1 Roper Leg. 170; Wms. Exrs. 1158. "A specific legacy," says Langdale, M. R., "is something distinguished from the rest of the testator's estate; and it is sufficient if it can be specified and distinguished from the rest of the testator's estate at the time of his decease." 3 Beav. 342. There is an intermediate sort of legacy known as the "demonstrative legacy," according to writers on the law of Wills. Wms. Exrs. 1160; 2 Redf. Wills, 136-140; 4 Ves. 555. But the two main classes are as stated above; while it is to be remembered that their several incidents are variable according to a testator's declared wishes.

which shall be in my library," or "all the furniture which shall be contained in my dwelling-house," this legacy is a specific one.¹ Or, to proceed with the distinction, should a testator bequeath \$10,000 in the public funds, or \$10,000 in first-class railroad bonds, or simply \$10,000, the legacy would be general; while, on the other hand, the bequest of \$10,000 "of my stocks in the public funds," or "of my railroad bonds," answering such a description, or of "\$1,000 out of my savings-bank deposit in B.," it will be held specific. To the latter class belongs a bequest of all the stock in the public funds, all the first-class railroad bonds, or all the savings-bank deposits to which the testator may be entitled at the time of his death; and so, too, with any designated portion thereof.² A specific legacy may be given under a will, with the substitution besides of a general pecuniary legacy in case of its failure, to be satisfied in a specific manner.³ The balance of a partnership settlement not drawn out of the concern, or the good-will of a business, may be specifically bequeathed, in whole or in part;⁴ and so may a debt or claim in favor of the estate;⁵ and insolvency of the concern or of the debtor renders the legacy worthless.

It should be observed, however, that no direction out of what fund the legacy shall be raised will render that legacy specific, unless the clear intent was to transfer all or a part of the same identical fund.⁶ Nor will a legacy be rendered specific, by directions incidental to a general bequest; such as a certain sum of money to be laid out in mourning rings;

¹ *Ib.*; *Fontaine v. Tyler*, 9 Price, 94.

² *Bothamley v. Sherson*, L. R. 20 Eq. 304; 2 Redf. Wills, 134, 135; *Wms. Exrs.* 1162, and *Perkins's* note; *Ludlam's Estate*, 13 Penn. St. 189; *Johnson v. Gross*, 128 Mass. 433; 1 *Roper Leg.* 170; *Fontaine v. Tyler*, *supra*; *Herring v. Whittam*, 2 Sim. 493; *Foote, Appellant*, 22 Pick. 299. Specific bequests of money are not frequent; but such a bequest may be made as out of a certain place of deposit, or from a fund placed in a certain person's hands, or of money arising out of a particular

security. *Lawson v. Stitch*, 1 Atk. 507; *Perkins v. Mathes*, 49 N. H. 107.

³ *Fontaine v. Tyler*, 9 Price, 94; 2 Redf. Wills, 132, 133. There may be a bequest of shares in the capital stock of a joint stock company, although the testator held stocks of the denomination in excess of the bequest. *Norris v. Thomson*, 2 McCarter (N. J.) 493.

⁴ *Ellis v. Walker*, Amb. 309; *Fryer v. Ward*, 31 Beav. 602.

⁵ 2 Del. Ch. 200; *Farnum v. Bascom*, 122 Mass. 282.

⁶ 2 Redf. Wills, 135.

or \$1,000 to recompense the executor, or for charity, or to be invested in a prescribed class of securities, or payable in cash.¹ A reference, on the other hand, to the fact of one's death for ascertaining his legacy — as in the bequest of "all the horses which I may have in my stable at the time of my death" — does not render the gift other than specific.²

One important consequence of this distinction between general and specific is, that, should the assets prove deficient, general legacies must abate, while a specific legacy does not; and, on the other hand, should the specific legacy fail, or come short, for want of the identical things described, the legatee can claim no satisfaction out of the general personal estate.³ In some instances, therefore, the specific legatee is the better off, and in others the worse. Since, however, specific bequests, on the whole, interfere with a just and uniform settlement of an estate as one whole, courts of equity lean against pronouncing legacies specific in doubtful cases.⁴ Nevertheless, testamentary intention shall prevail, if duly expressed; and so clearly separable in sense is a specific from a general legacy, that even though the testator should expressly provide against the ademption of a legacy specifically identified in his will, such legacy is not thereby rendered a general one, and denuded of its other peculiar incidents.⁵

✓ § 462. **Whether a Residuary Bequest can be deemed Specific.** — The bequest of all one's personal estate, or the devise and bequest of all the residue, both personal and real, cannot be treated as specific; but such a disposition, from its own terms, is general and residuary, and subject to the usual payment of debts and legacies.⁶ Nor is a general residuary clause to be otherwise construed, merely because some of the particulars of which it shall consist are enumerated in the will.⁷ But

¹ *Ib.*; Wms. Exrs. 1162; Richards v. Richards, 9 Price, 226; Lawson v. Stitch, 1 Atk. 507; Edwards v. Hall, 11 Hare, 23; Apreece v. Apreece, 1 Ves. & B. 364.

² Bothamley v. Sherson, L. R. 20 Eq. 309, *per* Jessell, M. R.

³ See *post* as to the ademption of

legacies; 2 Redf. Wills, 135; Wms. Exrs. 1159.

⁴ See Lord Chancellor in Ellis v. Walker, Amb. 309; Wms. Exrs. 1160.

⁵ 2 Coll. 435.

⁶ See Wms. Exrs. 1172-1177; Fairer v. Park, L. R. 3 Ch. D. 309.

⁷ Taylor v. Taylor, 4 Hare, 628.

there may be a specific bequest of all one's estate in a particular locality;¹ so, too, the bequest of what shall remain of a specific and identical thing or fund, after other legacies enumerated shall have come out of it, or specified incumbrances are removed, may be specific, so long as the directions be capable of fulfilment without destroying the identity of the thing or fund itself.²

§ 463. Bequests for Illegal and Immoral Purposes void; Foolish Objects, etc. — A bequest to further and carry into effect any illegal purpose, which the law regards as subversive of sound policy or good morals, and destructive to the fundamental institutions of society and the civil government, will, on general principle, be held void; and the executor is not justified in paying it.³ Men's ideas as to civil polity or follies are by no means immutable, however.

Whenever a charitable intent appears on the face of the will, but the terms used are broad enough to allow of applying the fund either in a lawful or unlawful manner, the gift will be supported, and its application restrained within the bounds of law.⁴ And, where some bequests, in a duly probated will, are invalid, and must fail, the valid provisions should nevertheless be executed.⁵

§ 464. Bequests to Charitable Uses; Statute of 43 Elizabeth, c. 4. — Gifts to charitable uses had their origin in the Christian dispensation, and are found regulated by the Justinian code.⁶ Our English law on this subject is controlled by the stat. 43 Eliz. c. 4.⁷ Since this enactment, English courts of

¹ Nisbett v. Murray, 5 Ves. 150; 2 Vern. 683; Wms. Exrs. 1172.

² Ib.

³ 2 Beav. 151; 2 My. & K. 697; 1 Salk. 162; Habeshon v. Vardon, 7 L. L. & Eq. 228.

⁴ Gray, J., in Jackson v. Phillips, 14 Allen, 556.

⁵ Bent's Appeal, 38 Conn. 26.

As to bequests for "superstitious uses," so called, the policy of our law has greatly changed in the course of

two centuries, consistently with the advance of religious toleration. See, in detail, 2 Redf. Wills, 495, etc.; Wms. Exrs. 1055.

⁶ Code Just. I. 3.

⁷ 1 Jarm. (ed. 1861), 192; 2 Redf. Wills, 2d ed. 499. This statute specifies the following gifts as charitable: For the relief of aged, impotent, and poor people; for the maintenance of sick and maimed soldiers and mariners; for schools of learning, free schools and

equity have treated charitable bequests as properly restricted to the purposes therein enumerated, and to such, besides, as by analogy may be deemed within its spirit or intendment. "Charitable use" is a term not easily defined; nor does the statute of 43 Eliz. define, but rather illustrates by instances such as might vary from age to age. Lord Camden's definition, often quoted, that a gift to charity is "a gift to a general public use, which extends to the poor as well as to the rich,"¹ seems to touch the vital point; namely, that the private benefaction should be well designed to promote some public object of utility. Where such is the case, the disposition of English chancery has constantly been to bring the bequest by analogy within the purview of the statute, even though literal interpretation might have excluded it.²

In this liberal sense, gifts to charitable uses are likewise sustained in all or most of the American States; our equity courts resting their jurisdiction upon this statute, as part of the law of England which the first settlers brought over with them; or else deriving it from that earlier common law founded in the precepts of the Christian religion, and the divine injunction that love of God be manifested in the love of our fellow-men,—which such enactments serve only to explain and apply.³

scholars in universities; for the repair of bridges, ports, havens, causeways, churches, sea-banks, and highways; for the education and preferment of orphans; for the relief, stock, or maintenance for houses of correction; for the marriages of poor maids; for the supportation and help of young tradesmen, handicraftsmen, and persons decayed; for the relief or redemption of prisoners or captives; for the aid or ease of poor inhabitants; and concerning payment of fifteens, setting out of soldiers and other taxes.

¹ *Jones v. Williams*, Amb. 651. Sometimes incorrectly ascribed to Lord Hardwicke, the reporter failing to designate clearly the individual.

² 2 Redf. Wills, 498.

³ 2 Story Eq. Jur. §§ 1155-1164; 2

Kent Com. 287, 288; *Burbank v. Whitney*, 24 Pick. 146; *Drury v. Natick*, 10 Allen, 177; Wms. Exrs. 1069, 1070, and Perkins's notes. In *Jackson v. Phillips*, 14 Allen, 556, Gray, J., quotes approvingly the language used by Mr. Binney in arguing the *Girard Will Case*, 41, that a charitable or pious gift is "whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense—given from these motives and to these ends—free from the stain or taint of every consideration that is personal, private, or selfish." And see 28 Penn. St. 35.

The New York doctrine of charitable uses is drawn from the common law and local statutes, irrespective of 43 Eliz. Denio, J., in *Williams v. Williams*, 4 Seld. 525.

§ 465. **Bequest void for Uncertainty; or where Principal or Interest is locked up too long.** — There may be bequests void for uncertainty.¹ So may the bequest fail when given to remain in bulk for some remote unborn generation, in violation of the rule against perpetuities.² Nor should income be locked up too long, to accumulate for distant posterity, and so as to debar immediate survivors of the decedent from receiving income as well as capital.³

¹ 2 Redf. Wills, 384-407, and numerous citations; 2 P. Wms. 387; *Jubber v. Jubber*, 9 Sim. 503; Wms. Exrs. 1155. But mistakes of description may sometimes be corrected by construction. 1 Redf. Wills, c. 10; 2 ib. 202; 1 Bro. C. C. 91; *Tomkins v. Tomkins*, 3 Atk. 257; Wms. Exrs. 1152-1155, and Perkins's notes.

² After some fluctuation in the decisions, the limitation finally fixed upon is the period of a life or lives in being at the death of the testator, and twenty-one years more; adding, in case of a posthumous child, a few months longer, to allow for the period of gestation. If a further postponement be attempted, the limitation is void. *Bengough v. Edridge*, 1 Sim. 173; 7 Bligh, 202; 1 Jarm. Wills, 226-229; 2 Redf. Wills, 568, *et seq.* Of two possible constructions, that seems to be preferred which would avoid violating the rule against perpetuities and thus vitiating the bequest. *Rand v. Butler*, 48 Conn. 293.

A tendency to perpetuity is no objection, however, to a charitable bequest; for charity, it is said, never fails. 2 Redf. Wills, 546, 547; *Odell v. Odell*, 10 Allen, 1; *Williams v. Williams*, 2 Seld. 525. But a gift to keep family tombs in perpetual repair is objectionable under the rule of the text. 10 Jur. N. S. 648. The American rule against perpetuities is like the English, but statute qualifications are found. See 23 Hun, 223.

³ See *Thellusson v. Woodford*, 4 Ves. 227; 2 Redf. Wills, 560. The usual rule

applies (where no statute intervenes) to capital and income alike. Mr. Thellusson's will gave a large fortune to accumulate in trust, income being added to principal, during all the lives in being at his decease, and for twenty-one years more; in other words, for the entire period permitted by the rule against perpetuities. Such was the public indignation in England at this heartless bequest, that Parliament passed an act (39 & 40 Geo. III. c. 98) which forbade accumulation thenceforth under trusts longer than the life of a grantor or settlor, and the term of twenty-one years after his death, or during the minority of such as would otherwise be entitled under the will. This act, still styled the "Thellusson act," loads the testator's memory with a reproach which may well outlast the suspension of his benefaction. The restraints of this act apply not only to cases expressly providing for, but to such also as by implication result in, such accumulations. See 2 Redf. Wills, 560, 563; 1 Jarm. Wills, 293. In the several United States, either there is local legislation on this point, or else the general restriction as to accumulating both capital and income prevails.

As to the English statute of mortmain, which imposes especial restraints upon devises of land for charitable purposes, etc., see act 9 Geo. II. c. 36 (1736); 1 Jarm. Wills, 219; 2 Redf. Wills, 508; Wms. Exrs. 1058, *et seq.* American policy is not uniform in this respect. See 2 Kent Com. 283; 79 N. Y. 327; 69 Mo. 492.

§ 466. **Legacies Absolute or Conditional, Vested or Contingent.** — Legacies may be made conditional; the condition annexed being either precedent or subsequent; so that, on the one hand, the bequest may never take effect, or, on the other, it may take effect with the liability of being afterwards defeated. Legacies, however, are usually absolute, or are so given without condition as to vest immediately and fully.

✕ Devises and legacies, moreover, may be vested or contingent, and may be given under such limitations as to confer an interest in possession to one, and an interest, by way of remainder, to another; thus giving rise to many abstruse questions not properly discussed in a treatise like this.¹ But every interest under a will vests at the decease of the testator, unless otherwise provided; and even an interest to take effect in possession after a precedent one, may vest simultaneously with it in right, so as to devolve upon the executors or administrators of any legatee who, having survived the testator, may die afterwards before his possession has vested; nevertheless, an interest which is clearly contingent must be so construed, however inconvenient to a beneficiary and his representatives.²

§ 467. **Lapsed Legacies; General Rule.** — There is an implied condition, precedent to all legacies, founded in the ambulatory character of the will itself, during the maker's own life; namely, that the testator must first die, leaving the instrument as his last true will, before it can operate as such. The death of the legatee named therein before the testator, causes, therefore, the legacy to lapse; while, as the preceding section shows, the condition precedent, or contingency with which the bequest may have been coupled, produces a lapse in various instances where the legatee dies after the testator. For a lapsed legacy is one which never vests: either (1) in consequence of the death of the legatee before the testator; or, (2) because, notwithstanding the legatee survive the tes-

¹ See Wms. Exrs. 889; 2 Redf. 575. And see Clayton v. Somers, 27 Wills, 215, *et seq.* For a recent example of condition subsequent in a legacy, see Hammond v. Hammond, 55 Md. N. J. Eq. 230.

² 2 Redf. Wills, 215, 216.

tator, he dies before his interest can be said to have vested under the will. Lapsed legacies are most commonly of the former kind.¹

There are cases where the death of the legatee, subsequent to the testator's death, will cause the legacy to lapse, his interest not having vested in the meantime. Such is not the general rule; but, if the legatee die after his testator, and before payment, his own executor or administrator may demand the legacy of the testator's representatives.² Yet, where the will expressly and absolutely postpones payment of the legacy until a later period than the testator's death, we are to inquire what is the intent of such a provision.³

§ 468. Cumulative Legacies; Repetition or Substitution of Legacies. — Where the same, or a different amount of money or other things, as estimated by quantity, is bequeathed to the same person by the same will more than once, it may be a question whether the legatee shall by intendment take both amounts or one only; for, in the one case, the legacies are cumulative, while, in the other, a mere repetition of the bequest, or else a substitution, takes place.⁴

¹ 2 Redf. Wills, 158, *et seq.*; Swinb. pt. 7, § 23, pl. 1; Wms. Exrs. 1204-1206; 1 P. Wms. 83. As to the presumption of survivorship where both testator and legatee perished by the same calamity, see Lord Cranworth in *Underwood v. Wing*, 4 De G. M. & G. 633, 661. And see *Maitland v. Adair*, 3 Ves. 231; 2 Redf. Wills, 160.

² Swinb. pt. 7, § 23, pl. 1; *Gartshore v. Chalie*, 10 Ves. 13; Wms. Exrs. 1224; *Hester v. Hester*, 2 Ired. Eq. 330; *Traver v. Schell*, 20 N. Y. 89.

³ If the testator's apparent intention was to emphasize the law concerning the time of payment, or to modify it for the convenience of the legatee on the one hand, or of his own executor on the other, the title vests immediately upon his death, following the usual rule; and so, in general, where it appears to have been intended that one's bounty should immediately attach upon

his death. If, however, the context and circumstances forbid such favorable interpretation, and the testator obviously meant to incorporate time, not with the payment, but with the substance of the gift, as a condition precedent to vesting the title, the legacy is here contingent in interest; and, being contingent, it lapses if from death of the legatee or other cause it cannot have vested. Courts of equity incline, on the whole, to adopt a construction most favorable to vesting the interest, provided the testator's wishes be not thereby violated. 3 Woodeson, 512; Wms. Exrs. 1224; *Eldridge v. Eldridge*, 9 Cush. 516.

This subject, which presents many abstruse inquiries, all resolvable by the rule, that what appears to have been the testamentary intent should prevail, is examined at length in Wms. Exrs. 1224-1251; 2 Redf. Wills, 215-260.

⁴ Wms. Exrs. 1289; 2 Redf. Wills,

Added legacies or substituted legacies are presumed to carry the incidents of the original legacy; though such presumptions yield readily to proof of the testator's real intention.¹

§ 469. **Satisfaction of Debt or Portions by Legacies.**—There is an old rule, founded upon a series of English equity precedents, which, to quote Judge Redfield's expression, seems still to maintain "a kind of dying existence," though whimsical and unsatisfactory; namely, that where a debtor bequeaths to his creditor a legacy equal to or greater than the amount of the debt, it shall be presumed, all other things being equal, that he meant the legacy should operate in satisfaction of the debt.² Upon this presumption, supposing it available—and how unlikely it is that one should intend discharging, by way of favor, and on the contingency of his death, that which subsists as a legal obligation, regardless of that contingency or of his last wishes, and taking precedence of all legacies, a moment's reflection will show—the courts have engrafted various exceptions, often laying hold of little circumstances or expressions, as if to show a readiness to reverse the rule.³

178; 2 Redf. Wills, 179–181; *Guy v. Sharp*, 1 My. & K. 589; *Hubbard v. Alexander*, 3 Ch. Div. 738; Wms. Exrs. 1290–1294; *De Witt v. Yates*, 10 Johns. 156; *Rice v. Boston Aid Society*, 56 N. H. 191; *Suisse v. Lowther*, 2 Hare, 424, 432, *per* Wigram, V. C. The testator's intention should be the main guide; though to fortify the construction in cases of doubt, various presumptions are stated by courts of equity. Cases, *supra*; *Tweeddale v. Tweeddale*, 10 Sim. 453; *Guy v. Sharp*, 1 My. & K. 589. Legacies, not of the same kind, or not payable in the same event, or at the same time, may well be presumed cumulative. 2 Redf. Wills, 181; *Wray v. Field*, 2 Russ. 257. But where legacies are of the same amount and character, the presumption that they were intended to be cumulative is a slight one, and may

be easily shaken. 17 Ves. 34, 41; 2 Redf. Wills, 181; Wms. Exrs. 1291, and numerous cases cited. See also *State v. Crossley*, 69 Ind. 203.

¹ *Cooper v. Day*, 3 Meriv. 154; Wms. Exrs. 1296; 7 Sim. 237; *Duncan v. Duncan*, 27 Beav. 386.

² 2 Redf. Wills, 185, 186; *Bronson, J.*, in *Eaton v. Benton*, 2 Hill (N. Y.) 576; Wms. Exrs. 1297.

³ 2 Redf. Wills, 187, and cases cited; Wms. Exrs. 1298, and cases cited; 1 Atk. 428; 3 Atk. 96; *Byde v. Byde*, 1 Cox, 44; *Rawlins v. Powel*, 1 P. Wms. 299; 2 P. Wms. 132, 343; *Nicholls v. Judson*, 2 Atk. 300; Wms. Exrs. 1298; *Crouch v. Davis*, 23 Gratt. 62; *Carr v. Eastabrooke*, 3 Ves. 561. Even a direction in the will to "pay all debts and legacies" has been relied on as the foundation of an exception. 3 Atk. 65;

§ 470. **Release of Debts by Legacies.**—Where a creditor bequeaths a legacy to his debtor, without clearly indicating his intention in so doing, the presumption appears to be that the debt shall not thereby be released or extinguished; and if the debt be further evidenced by a promissory note or other writing, and the writing, documents, or securities, appear among the testator's effects, uncanceled, and as though fit to be treated as assets, they will be so regarded.¹ Under such circumstances, it is held that the legacy of a creditor to his debtor may be retained in payment *pro tanto*, though the debt were barred by the statute of limitations.² Where, however, the evidence goes to show that the creditor meant to release the debt and give a legacy besides, his debtor shall have the full benefit thereof;³ and while such intention ought, if possible, to be gathered from the force of the will, courts of equity have sometimes explored in other directions to ascertain whether, as between creditor and debtor, the debt was ever remitted.⁴

To bequeath expressly the debt to one's debtor, operates as a sort of testamentary release to him; but, inasmuch as a testament cannot dispose of assets, or give legacies to the injury of creditors against the estate, the debt must needs continue assets for their benefit, should a deficiency appear.⁵

Field *v.* Mostin, 2 Dick. 543. See *supra*, § 439, concerning the effect of appointing one's creditor his executor.

As for satisfying portions by a legacy, a rule of presumption is applied by the equity decisions; though here, once more, the question is mainly one of the presumed intention of the testator.

¹ Wms. Exrs. 1303; Wilmot *v.* Woodhouse, 4 Bro. C. C. 226; 2 Redf. Wills, 189.

² Coates *v.* Coates, 33 Beav. 249; Courtenay *v.* Williams, 3 Hare, 589; Wms. Exrs. 1304; Brokaw *v.* Hudson, 27 N. J. Eq. 135.

³ Wilmot *v.* Woodhouse, 4 Bro. C. C. 226; Hyde *v.* Neate, 15 Sim. 554; Wms. Exrs. 1304; 2 Redf. Wills, 190.

⁴ Eden *v.* Smyth, 5 Ves. 341. Viewing the subject of releasing or satisfying

debts by legacies as one of purely testamentary interpretation, there seems legal inconsistency in going far outside the will to ascertain what a testator meant; and it is said to be dangerous to extend the doctrine of Eden *v.* Smyth, where the testator's books, papers, declarations, etc., were, though reluctantly, admitted. See Chester *v.* Urwick, 23 Beav. 404; Wms. Exrs. 1304; 2 Redf. Wills, 190, note. Yet it must be conceded that a transaction, as between debtor and creditor, may lie entirely outside the will, notwithstanding debtor or creditor be himself a legatee; nor is it strange for a testator to so regard it.

⁵ Rider *v.* Wager, 2 P. Wms. 331.

As to the effect of appointing a debtor to be one's executor, see *supra*, § 208.

§ 471. **Ademption of Legacies.**—A few words should be added on the subject of ademption. A bequest fails, doubtless, not only by a lapse, but when revoked.¹ Aside from the revocation of a testamentary instrument as such, any particular legacy or legacies may be revoked, or to use the more appropriate word, adeemed. By the word “ademption,” employing its Latin figure, is signified the extinction or taking away of a legacy in consequence of some act of the testator which, though not directly a revocation of the bequest, should be considered in law as tantamount thereto.² The ademption of a legacy is distinguishable, of course, from its lapse.³

† § 472. **Trustees under a Will; Equity and Probate Jurisdiction; Duties of a Trustee; Equity; Probate Procedure.**—In order to carry out special provisions under a will, which look to the preservation of a principal fund for specified schemes, such as charity, or so as to pay income only to persons designated, until the happening of some event, or so that the fund may accumulate, and generally where the intent is to postpone the full beneficial vesting of the legacy in the ultimate legatee, trustees are usually designated under a will to hold and manage the fund, apart from executors. These trustees act subject to the approval, direction, and sometimes selection of courts of equity; and, properly speaking, the administration of these testamentary trusts is a branch, and quite an important one, of equity jurisdiction. In many parts of the United States, however, the probate courts in the several counties have general equity powers, conferred by statute, and exercised concurrently with the supreme tribunal of the State.⁴

The appointment, qualification, and immediate supervision of testamentary trustees, devolves, however, under American

¹ See *supra*, § 82.

² 2 Redf. Wills, 431; Wms. Exrs. 1321.

³ *Supra*, § 467.

⁴ 1 Redf. Wills, 438; Mass. Gen. Stats. c. 100, § 22. Nevertheless, the prevailing disposition is to bring impor-

tant questions affecting the administration of testamentary trusts to the supreme court of equity and probate, in order that the jurisdiction may be clear and the decree conclusive.

codes, upon the local probate courts, in the first instance, as in case of executors. Not only are such courts empowered to appoint trustees in various instances of trust not testamentary, where there is a vacancy under the instrument, and no adequate provision made for supplying it, but every trustee appointed by will should petition for a confirmation of his appointment, file a sufficient bond with the probate judge (with or without security, as the case may be), and procure letters under the probate seal, before entering upon active official duties.¹ The duties of testamentary trustee are distinct from those of executor, and require separate credentials, even though, as often happens, the testator has designated the same person to serve in both capacities. Where a vacancy from some cause occurs in the office, as where the trustee named declines, resigns, dies, or is removed before the objects thereof are accomplished, the probate court, upon the usual formalities, makes an appointment for one to act alone or jointly with others, as the case may be. Co-trusteeship survives like co-executorship. Like an executor, the testamentary trustee is required to return an inventory and render his accounts regularly to the probate court; and, for misconduct or culpable negligence, he is liable to removal, his bond to the judge being put in suit for the benefit of those injured by his breach of trust. Subject to the usual variation of State enactments, the general rule, in the United States, is to place testamentary trustees under a probate supervision similar, *mutatis mutandis*, to that of executors, and from a like sedulous regard for the welfare of the beneficiaries.² From the probate decree in such trusts, the usual appeal lies to the supreme tribunal of the State.³

§ 473. **Construction of Wills and Legacies; Bill of Interpleader to remove Doubts, etc.**—The construction of a will, and the true interpretation of an executor's or trustee's duties in conformity thereto, raise other issues which pertain more

¹ Mass. Gen. Stats. c. 100.

² Smith Prob. Law, 238. See Perry

³ Smith Prob. Law, 93, 97, 101, 236; Trusts, § 282 *et seq.*
Redf. Surr. Pract. 424.

strictly to an equity jurisdiction, where the course to be pursued is left uncertain. The convenient method is to bring a bill of equity in the nature of a bill of interpleader, to procure instructions how to act; thus saving to the fiduciary, executor or trustee, the hazards of later litigation, and avoiding on his own part a perilous risk. Whenever there is reasonable doubt in regard to the proper construction of an instrument creating a testamentary trust, the rule is, that chancery may be resorted to for instructions.¹

As between the executors and trustees under a will, it would seem a rational distinction, that, when the doubtful interpretation relates simply to administering a fund or funds turned over to the trustees for purposes prescribed by the testator, the trustees are the proper persons to procure instructions; but, that where such doubt relates substantially to the administration of the estate, as in determining how the executor shall perform his own duties, so as to discharge himself of legacies and the residue for whose satisfaction he is officially responsible, he rather should be the petitioner. While, however, the executors or the trustees, as the case may be, take more commonly the initiative, and bring a bill setting forth the facts, and calling upon the claimants to settle their rights before the court, the procedure is not left wholly to their option; but any party, claiming an interest affecting the construction of the will, legatee or *cestui que trust*, may institute the suit against the executor or trustee and all other parties interested in the question.²

Where directions are thus sought in regard to the interpretation of a will or trust, and the duty of those appointed to carry its provisions into effect, the whole expense of the

¹ 1 Redf. Wills, 437, 492; *supra*, § 265.

² Martineau v. Rogers, 8 De G. M. & G. 328; Maxwell v. Maxwell, L. R. 4 H. L. 521; Bowers v. Smith, 10 Paige, 193; Treadwell v. Cordis, 5 Gray, 341; 1 Redf. Wills, 493; 2 Story Eq. Jur. 824, and cases cited.

Where one is both administrator with the will annexed and trustee under the

will, he may maintain a bill in equity against the *cestui que trust*, and a creditor who has brought suit against him to determine whether moneys received by him from the representatives of the deceased executor are to be accounted for as belonging to the estate or the trust. Putnam v. Collamore, 109 Mass. 509. See Clay v. Gurley, 62 Ala. 14.

litigation is thrown upon the estate, unless the petitioner discloses a frivolous case.¹ This may prove an especial hardship to residuary legatees ; and no precaution is so good as that of making one's own testamentary scheme clear, simple, and just.²

X § 474. **Construction of Wills, Legacies, etc.**—To enter into a discussion of the general rules affecting the construction of wills and the legacies given by a testator is foreign to the purpose of this work. The cases under this head, which are very numerous, may be found in general treatises on wills, English and American, like those of Jarman and Redfield. The leading principle, which the courts of both countries respect, is that the testator's intent shall be followed, if possible ; this intent, to use a common figure of judicial speech, being the pole star by which the court should be guided.³ Such a rule, to be sure, leads into various courses, since every will must be steered by its own luminary. Yet, uniform justice is better than strict consistency ; and it is observable, that, while in contracts the common mind of two or more must be sought out from their mutual expression, a will expresses but one mind essentially, and one disposition ;

¹ 2 Redf. Wills, 493; *Studholme v. Hodgson*, 3 P. Wms. 303; *Attorney General v. Jesus College*, 7 Jur. N. S. 592; *Sawyer v. Baldwin*, 20 Pick. 378; *Rogers v. Ross*, 4 Johns. Ch. 608; *Howland v. Green*, 108 Mass. 283. English practice is to pay the fund into court, and have the parties appear and obtain the judgment of the courts as to their rights. *Hooper's Will*, *Re*, 7 Jur. N. S. 595.

² Chancery seeks, if it be practicable, to adjust the costs ratably to the various interests affected by the construction. See L. R. 7 Eq. 414.

³ See *Quincy v. Rogers*, 9 Cush. 294, *per Shaw*, C. J.

To this proposition various qualifications are found, which writers on the law of wills thus summarize from the decisions : (1) It is the intention of the

testator as expressed in his will, not a conjectural intention, which should govern, the words of that instrument being applied to the subject-matter and surrounding circumstances. (2) The general intent of the testator must, if clearly expressed, control particular terms which are not clear and consistent therewith. (3) While evident intent will override technical rules of construction, the testator's words must be interpreted according to the sense attached to them by long authority, unless they were manifestly used in a different sense. (4) A clearly expressed intention in one part of the will must not yield to doubtful construction in any other portion. (5) Punctuation is of minor importance in establishing construction. (6) Foolish and unjust provisions may be consistently enforced, if in accordance with

and again, as *inter vivos*, parties may oppose their own proofs, whereas the testator necessarily confides his meaning to an instrument which courts of equity are sacredly enjoined to interpret justly as between him and those he leaves behind, should controversy arise, death having closed his own lips.

§ 475. **Doubtful Points settled by the Agreement of all Parties in Interest.**—It is a general principle, that all the parties interested in an estate or fund, if competent and *sui juris*,

the testator's intent, and neither illegal nor contrary to good morals; yet a will should be brought by construction as near reason and good sense as practicable. (7) Some meaning will be given to the instrument if possible. *Wootton v. Redd*, 12 Gratt. 196. Numerous other rules of construction might be adduced, perhaps, however, to confuse rather than clear the subject; for, to properly construe a will, natural reason must be applied to the language of the instrument under the light of surrounding circumstances. These rules, which are stated in substance as above in 1 Redf. Wills, 433, 434, are supported by American precedents. English rules are laid down at greater length in Jarman, Wills (ed. 1861), 762, cited in 1 Redf. Wills, 425, note. See Mr. Justice Miller in *Clarke v. Boorman*, 18 Wall. 493, 502.

All the papers, will and codicils, must be taken together; and, to use a judicial expression, the intention of a testator must be ascertained from a full view of everything contained within "the four corners of the instrument." *Hoxie v. Hoxie*, 7 Paige, 187. And if the testator's intention cannot operate to the full extent, it must be allowed to work as far as it can. *Thellusson v. Woodford*, 4 Ves. 326.

The heir, it is well settled, shall not be disinherited without express words or necessary implication. *Jarm. Wills*, 762; 4 Beav. 318; *Areson v. Areson*, 5 Hill (N. Y.) 410; *Freemantle v. Taylor*, 15 Ves. 363. And, according to the American rule, as emphasized in various codes, no constructive exclusion

from the benefits of a parent's will shall avail against any child, all children being legal co-equals in distribution. *Bender v. Dietrick*, 7 W. & S. 284; 2 Redf. Wills, 434. Words and limitations may be transposed, supplied, or rejected, where warranted by the context or by the general scheme of the will; but not to support a conjectural hypothesis of the testator's intention, however reasonable. *Jarm. Wills*, 762; 9 Ves. 566; 1 Redf. Wills, 454, 467, 471. Words, obviously miswritten, too, are likewise construed as if written correctly. *Jarm. Wills*, 762; 2 De G. M. & G. 300. But, in construing a will which has been duly admitted to probate in all its parts, it would appear an excess of jurisdiction to compare the instrument with the draft, or enter into the inquiries whether mistake or fraud tainted the document so far as to pervert its expression in words or phrases from what the testator intended. See 2 Redf. Wills, 436; *Richards v. Davies*, 32 L. J. C. P. 3; *Leslie v. Marshall*, 31 Barb. 560; *Grant v. Grant*, L. R. 5 C. P. 736; *Wms. Exrs.* 1087. Interpretations and changes, furthermore, for the sake of adapting the will to a state of things unforeseen by the testator himself, are discountenanced. *Bookman v. Smith*, L. R. 7 Ex. 271.

A will speaks for some purposes, as good sense allows, from the period of execution, and for others from the death of the testator; but it never operates until the latter period. *Jarm. Wills*, 762; 1 Redf. Wills, 379-387, and cases cited.

may, by their own mutual agreement, waive stipulations under the will which affect its distribution, or agree upon some particular construction of doubtful provisions, so that the will shall be carried out accordingly. An executor, by procuring some such mutual agreement, may often relieve himself of an embarrassing responsibility without invoking the assistance of the court at all. Legislation sometimes extends expressly the right of thus adjusting conflicting interests, by empowering the executor or other fiduciary to bind the future contingent interests of parties not capable of being represented, wherever the court of equity shall declare the operation of such proceeding to be just and reasonable in its effect upon such interests.¹

¹ *Brophy v. Bellamy*, L. R. 8 Ch. 798.

law, makes legacies payable, unless the will fixes a later date, at the expiration of one year from the testator's death; the presumption being, that such delay allows the executor reasonable time for informing himself whether the estate is ample to pay both debts and legacies.¹ Within the first year, therefore, an executor cannot be compelled to pay over legacies, notwithstanding the will itself directs their earlier discharge,² unless, as some American statutes provide, one's directions to that effect must be followed.³ But, as this rule is set for the convenience of an estate, executors may of choice, and in fact often do, pay legacies much earlier where the estate is undoubtedly ample or a refunding bond is given.⁴ If the payment of a legacy is postponed by an intervening estate, by pending litigation, or for any other cause, more than a year after the testator's death, it becomes payable immediately when the right accrues, and the executor cannot claim further delay.⁵

Where the legacy is liable to be divested by a condition subsequent or limitation over upon some contingency, the legatee shall nevertheless receive his legacy at the end of a year from the testator's death; and, whether security shall be required of such legatee to refund in case his title be divested, depends upon circumstances; though equity dispenses with such security, unless prudence evidently requires it to be taken.⁶

A legacy, given under a will in the form of an annuity, or as regular income for life, follows the general rule as to the time when the executor must begin paying it; that is to say, the first payment need not be made by him until a year has

¹ *Wood v. Penoyre*, 13 Ves. 333; *Miller v. Congdon*, 14 Gray, 114; *King's Estate*, 11 Phila. (Pa.) 26; *Wms. Exrs.* 1387; *State v. Crossley*, 69 Ind. 203.

² *Benson v. Maude*, 6 Madd. 15; *White v. Donnell*, 3 Md. Ch. 526.

³ *Wms. Exrs.* 1387, and Perkins's note.

⁴ 1 Sch. & Lef. 12; *Garthshore v. Chalie*, 10 Ves. 13.

⁵ *Laundy v. Williams*, 2 P. Wms. 478; 2 Redf. Wills, 466; *Miller v. Philip*, 5

Paige, 573; *Lord v. Lord*, L. R. 2 Ch. 782.

⁶ *Fawkes v. Gray*, 18 Ves. 131; *Taggard v. Piper*, 118 Mass. 315; *Wms. Exrs.* 1388, and Perkins's note. Where a legacy was given to the father on condition that he did not interfere with the education of his daughter, security was required by the court, the costs being deducted from the legacy. *Colston v. Morris*, 6 Madd. 89.

elapsed from the testator's death; but the date from which the annuity or income shall actually commence, and the frequency of the periodical payments, must be gathered from the expressions of the will and the testator's obvious intent.¹

§ 479. **When the Legatee's Right vests; Rule as to Annuitants, Beneficiaries for Life, etc.**—Notwithstanding a year's possible delay in paying over the legacy, a legatee is entitled to payment, unless the will speaks differently, as of the date when the testator died.²

Doubts may arise, however, in case of a legacy by way of annuity; for the testator might have intended it to commence from the end of the first year, instead of what is more rational, from the date of his own death.³ There has been great fluctuation of opinion in the English equity courts, moreover, concerning the effect of a bequest of use, income, or interest in property, to a person for life, and then the principal over to others; but it is finally well established, that the beneficiary for life shall be entitled to the income in one shape or another from the death of the testator; and this, notwithstanding the life income is to be derived from a residuary fund which might not be ascertainable until two years or more had elapsed from the executor's appointment, and, moreover, might have to be transferred by the executor himself to trustees designated in the will.⁴ American courts approve of this conclusion;⁵ and there are local American statutes which expressly favor such construction as to all annuitants and income beneficiaries, either for life or until the happening of some event.⁶

¹ Wms. Exrs. 1390; *Irvin v. Ironmonger*, 2 Russ. & My. 531; *Storer v. Prestage*, 3 Madd. 167. For the Massachusetts rule, see *Wiggin v. Swett*, 6 Met. 194.

² 10 Ves. 1, 13; *supra*, § 467.

³ See *Gibson v. Bott*, 7 Ves. 96, 97; Wms. Exrs. 1390; *Kent v. Dunham*, 106 Mass. 586.

⁴ Wms. Exrs. 1390, 1391, and cases cited; *Brown v. Gellatly*, L. R. 2 Ch.

751; *Angerstein v. Martin*, 1 Turn. & R. 232; *Taylor v. Clarke*, 1 Hare, 161.

⁵ *Sargent v. Sargent*, 103 Mass. 297; *Evans v. Inglehart*, 6 Gill & J. 171; *Lovering v. Minot*, 9 Cush. 151; *Williamson v. Williamson*, 6 Paige, 298; *Hilyard's Estate*, 5 Watts & S. 30; *Cooke v. Meeker*, 42 Barb. 533. But see *Welsh v. Brown*, 43 N. J. L. 37.

⁶ Mass. Gen. Stats. c. 97, §§ 23, 24.

§ 480. **Interest and Produce of Specific Legacies.**— Out of regard for the time when the legacy legally vests, it is determined that a specific legacy shall go to the legatee, with whatever interest, income, or produce may have accrued thereon since the testator's death besides. Thus, a specific legacy of domestic animals carries subsequent offspring of the females and all profitable usufruct; a specific legacy of stock, the dividends since accruing; and a specific legacy of notes, bonds, or other incorporeal personalty, the interest and coupons, if any, appropriate thereto from a similar date; in short, whatever the specific thing or fund has legitimately earned from the time the legatee's right became vested.¹ Prudence dictates, therefore, that the executor should discharge himself of specific legacies as soon as he is satisfied that he may safely do so, considering the debts; for, while he retains the specific thing or fund with its accretions, he must account as for the management of something distinct from the testator's general estate.

In exceptional cases the specific bequest of an incorporeal chose is found, on due construction of the will, to carry even interest accruing in the lifetime of the testator, that is, from the time the will was executed.²

§ 481. **Interest on General Legacies.**— But, as to general legacies, the rule is somewhat different. Prudence in the general settlement of the estate is here requisite; but the year's delay allowed the executor operates to postpone interest on the several demands of legatees. Interest is recoverable, in general, from the time such a legacy becomes payable, and not sooner; which means, usually, after the expiration of the year from the testator's death.³ Though the testator directed payment of the legacy "as soon as possible," or

¹ Wms. Exrs. 1424; *Sleech v. Thorington*, 2 Ves. Sen. 560; *Barrington v. Tristram*, 6 Ves. 345; *Evans v. Inglehart*, 6 Gill & J. 171; *Bristow v. Bristow*, Kay, 600.

² 2 Redf. Wills, 467, 486; Wms. Exrs. 1438; *Harcourt v. Morgan*, 2 Keen, 274.

³ *Wood v. Penoyre*, 13 Ves. 326; *Crain v. Barnes*, 1 Md. Dec. 151; *Miller v. Congdon*, 14 Gray, 114; *King's Estate*, 11 Phila. (Pa.) 26; *State v. Crossley*, 69 Ind. 203; Wms. Exrs. 1424; 2 Redf. Wills, 466.

"with interest," this does not change the rule;¹ nor are phrases readily construed as justifying later payments without allowance of interest.² And even though the fund out of which payment of a pecuniary legacy is directed should bear interest meantime, residuary legatees are presumed entitled to the benefit.³ But, if the will clearly directs the payment of interest from an earlier date, the bequest is enlarged accordingly. And, where the legacy is decreed to be in satisfaction of a debt, the equity practice is to allow interest from the death of the testator.⁴ Where, moreover, the executor voluntarily pays the legacy over within the year, or invests it specifically for the legatee's benefit, or pays it into court and the court orders the money specially invested, the interest, profits, and income thereafter accruing will belong to such legatee.⁵

After the expiration of the year, interest is generally allowed to pecuniary legatees from whom payment is withheld; and especially does this hold true where it appears that the executor has all the time had the means in his hands wherewith to pay the legacy.⁶ And interest will run in the legatee's favor thenceforth, even though no demand has been made upon the executor for the legacy.⁷ There are cases which seem to lay stress upon the executor's opportunity to pay over and his delinquency in failing to do so at the proper time;⁸ as where the validity of the will was in litigation, or the grant of letters testamentary was justifiably delayed, or the legatee himself interposed obstacles, or assets sufficient were not then available. Yet the usual rule, English and American, has been that pecuniary legacies bear interest from the time when they become vested and payable under legal rules or the express terms of the will, provided the

¹ Webster v. Hale, 8 Ves. 410; Lawrence v. Embree, 4 Bradf. (N. Y.) Sur. 364.

² Kent v. Dunham, 106 Mass. 586.

³ Pearson v. Pearson, 1 Sch. & Lef. 10, per Lord Redesdale.

⁴ Shirt v. Westby, 16 Ves. 393; Clark v. Sewell, 3 Atk. 96; 2 Redf. Wills, 475.

⁵ Maxwell v. Wettenhall, 2 P. Wms.

27; Wms. Exrs. 1424, 1427; Sullivan v. Winthrop, 1 Sumner, 1; 2 Redf. Wills, 467.

⁶ Wood v. Penoyre, 13 Ves. 326, and other cases cited *supra*.

⁷ 2 Redf. Wills, 467; Wms. Exrs. 1427, and Perkins's note; Birdsall v. Hewlett, 1 Paige, 32.

⁸ See State v. Adams, 71 Mo. 620.

estate be ever in a condition to satisfy them, and notwithstanding the delay was occasioned on the legatee's part.¹ And, if the executor has sufficient assets, he must pay interest to legatees from the end of the twelve months whether the assets have been productive or not,² all intermediate profit, if received, going to swell the general bulk of the estate.

§ 482. **Interest on Legacies to Children, Widow, etc.; and other Special Instances.**—To the rule for delaying a reckoning of interest, well-settled exceptions exist in favor of young offspring not otherwise provided for;³ or so as to give corresponding support to a widow; or where in consideration of her release of dower; or so as to pursue special directions of the testator.⁴

¹ Wms. Exrs. 1427; *Kent v. Dunham*, 106 Mass. 586; *Smith v. Field*, 6 Dana, 361; *Fowler v. Colt*, 25 N. J. Eq. 202. In *Lyon v. Magagnos*, 7 Gratt. 377, the legatee died shortly after the testatrix, and there was no administration on his estate for twelve years; and yet interest was held to be payable. And Lord Redesdale, in *Pearson v. Pearson*, 1 Sch. & Lef. 10, mentions a case where the fund did not come to be disposable for the payment of legacies till nearly forty years after the death of the testator, and yet the legacies were held to bear interest from the year after the testator's death.

² *Pearson v. Pearson*, 1 Sch. & Lef. 10. For the rule as to compounding interest in case of delay, see Wms. Exrs. 1433; 2 P. Wms. 26; 106 Mass. 586; *post*, Part VII. Interest may be charged by way of penalty upon the representative himself, where the fault of delay is his own. We have seen that the beneficiary of income is entitled to income as computed from the testator's death. *Supra*, § 479. But, as to a legacy in the shape of an annuity, interest is not usually computable on an instalment until the first twelve months have elapsed. Those entitled to income or annuity are usually entitled to regular

payments after the first year, reckoning back, but not to interest upon income thus regularly paid. See Wms. Exrs. 1428; 8 Hare, 120.

The English chancery rule computes the rate of interest payable on a legacy at four per cent.; unless the rate should be increased, or interest compounded, because of the representative's breach of trust or culpable neglect. Wms. Exrs. 1432, 1433; Part VII. *post*. In the United States the rate fixed may be greater. 27 N. J. Eq. 492.

³ *Harvey v. Harvey*, 2 P. Wms. 21; *Brown v. Temperly*, 3 Russ. 263; *Martin v. Martin*, L. R. 1 Eq. 369; *Williamson v. Williamson*, 6 Paige, 298; Wms. Exrs. 1429; 2 Redf. Wills, 467-469; *Magoffin v. Patton*, 4 Rawle, 113. This rule is enforced, even though the will should expressly direct an accumulation of the income. *Mole v. Mole*, 1 Dick. 310.

⁴ 2 Redf. Wills, 471-475; 1 Beav. 271; *Williamson v. Williamson*, 6 Paige, 298. But see 2 Penn. St. 221. A legacy payable at a future fixed date, or on a future contingency, carries no interest in such legatee's favor, as a rule, until the date arrives or the contingency happens. Wms. Exrs. 1428. But where the payment of a legacy is postponed to

§ 483. **To Whom Legacies should be paid; Deceased Legatees; Infants, Insane Persons, etc.** — The executor is bound to pay each legacy to the person entitled to receive it, or to his proper legal representative. If the legatee has deceased since the testator,¹ his executor or administrator is the proper representative; and an appointment may be needed accordingly for the express purpose of discharging such payment.² Where the legatee is an infant, the parent or natural guardian of the child should not be paid, nor the child himself, but the child's probate or chancery guardian duly appointed and qualified.³ Where, too, the legatee is insane, the qualified guardian or committee of such insane person is, in American probate practice, the proper person to receive the legacy.⁴

§ 484. **To whom Legacies should be paid; Absentees, Persons not known, etc.** — Aside from legislation expressly providing for the case of absentees,⁵ the executor may find

a future period, and the will directs that when that period arrives payment shall be made *with interest*, the legacy bears interest from the end of the year after the testator died. *Knight v. Knight*, 2 Sim. & Stu. 792; 2 Wms. Exrs. 1430. Compound interest on the legacy will, if directed, be allowed the legatee. *Arnold v. Arnold*, 2 My. & K. 365; Wms. Exrs. 1432, 1433; *Treves v. Townshend*, 1 Bro. C. C. 386; *Williams v. Powell*, 15 Beav. 461.

¹ If the legatee dies before the testator, the legacy usually lapses. See *supra*, § 467; *Jones v. Letcher*, 13 B. Mon. 363.

² In English chancery practice, where a legatee of a residue less than £20 has died, and has no personal representative, distribution among his next of kin is permitted without requiring administration to be taken out. 2 Hemm. & M. 32. But see generally as to requiring administration, *supra*, § 91.

³ Schoul. Dom. Rel. 3d ed. § 302; *Dagley v. Tolferry*, 1 P. Wms. 285; *Miles v. Boyden*, 3 Pick. 213; *Genet v.*

Tallmadge, 1 Johns. Ch. 3; *Quinn v. Moss*, 12 Sm. & M. 365. Letters of probate guardianship often issue in American practice because some legacy or distributive share vests. But English chancery guardianship is so costly, that, under stat. 36 Geo. III. c. 52, § 32, the executor is permitted to pay such legacies into the Bank of England in various cases. See Wms. Exrs. 1406-1408; 31 Beav. 48; 2 Redf. Wills, 478.

⁴ Schoul. Dom. Rel. 3d ed. § 293. As to married women, the common-law rule has now so completely changed, that, in general, only the wife herself can receipt for her separate legacy, and it cannot be paid to her husband. See Schoul. Hus. and Wife, *passim*.

⁵ The English statute 36 Geo. III. c. 52, § 32, permits legacies of absentees "beyond the seas" to be turned, like those of infants, into the Bank of England. See Wms. Exrs. 1407, 1421. And see *Birkett, Re*, L. R. 9 Ch. D. 576. American statutes, somewhat corresponding in tenor, may be found; but our legislation is usually with reference

himself embarrassed with respect to legacies which are nominally payable to persons who, in fact, have long been absent and missing, and cannot with certainty be pronounced alive or dead. Probate courts have no inherent jurisdiction of questions pertaining to the payment of legacies. The executor's better course, when left with legacies in his hands awaiting unknown claimants, appears to be, in the absence of positive statute direction, to trust himself to the guidance of chancery, investing or disbursing the fund as that court may require. Where a legatee has been long absent, sixteen years or more, without being heard from, chancery has presumed death, in various instances; directing, it may be, that those entitled in such contingency to the legacy, should, upon its receipt, furnish security to refund in case the legatee should ever return.¹

§ 485. To whom Legacies should be paid; Testamentary Trustees, etc. — If the bequest be to one person for the benefit of others, or with directions to expend the fund for the use of others, either generally, or in a particular mode, the executor may safely make payment to such person, as trustee, without reference to the parties beneficially interested.² It is customary in modern wills for the testator to name trustees who shall hold funds bequeathed for the benefit of others, or for special purposes, such as charity, and wherever a full legal title in the beneficiary is suspended.

Testamentary trustees, in American practice, must qualify and receive letters from the probate court before they are empowered to act; nor should an executor place the trust fund in their hands until they have conformed to statute.³ Even though the same person be constituted executor and trustee under the will, he must procure his credentials as trustee in due form, as preliminary to holding and managing

rather to unclaimed balances in an administrator's hands. See next chapter.

¹ *Dixon v. Dixon*, 3 Bro. C. C. 510; *Bailey v. Hammond*, 7 Ves. 590; *Wms. Exrs.* 1420. See *Lewes' Trusts, Re*, L. R. 11 Eq. 236.

² 2 Redf. Wills, 477; *Cooper v. Thornton*, 3 Bro. C. C. 96; *Robinson v. Tickell*, 8 Ves. 142.

³ *Newcomb v. Williams*, 9 Met. 535.

the fund in his new capacity.¹ Where the testator omits to name a trustee, or the trustee named is disqualified, or declines to act, or a vacancy afterwards occurs from any cause, proceedings may usually be had, in American practice, for filling the office by a probate appointment.²

§ 486. **Delivery of Specific Legacies; Legatee's Right to select.**—Specific things bequeathed should be identified and delivered to the respective legatees, as directed by the will. Where the testator bequeaths a number of things, out of a larger number belonging to him,—as in a bequest of “ten of the horses in my stable,”—it is held that the legatee has a right of selection from the number.³ But where the entire fund is bestowed in parcels, to be divided among different legatees, such individual selection would be impracticable.⁴

¹ See *Miller v. Congdon*, 14 Gray, 114; § *post*.

² See local statutes as to appointing testamentary trustees. *Smith Prob. Pract.* 90-93; also Lord Alvanley in *Cooper v. Thornton*, 3 Bro. C. C. 96; *Wms. Exrs.* 1796. If a legacy is given in trust, no person being named as trustee, it may be incumbent on the executor as such to administer the same according to the provisions of the will. *Groton v. Ruggles*, 17 Me. 137. Where, however, the testator appointed one to be his sole executor, and bequeathed to him “his executor and trustee,” his property in trust, the offices of executor and trustee are distinct, and must not be blended. *Wheatley v. Badger*, 7 Penn. St. 459. And see *supra*, § 472. As to transferring from one capacity to the other where the same person is executor and trustee, see *supra*, § 247; *Wms. Exrs.* 1399, and Perkins's note.

It may happen that a particular fund or the residue of the estate is to be invested in good and productive securities, and held, by the true intendment of the will, in trust by the executor himself, for purposes of accumulation; or, so as

to pay out income only, until some prescribed period has elapsed, or a certain contingency happened; whereupon the principal shall be paid by him to the person or persons ultimately entitled thereto under the will, or in default of such ultimate disposition, to those entitled under statutes of distribution in case of intestacy. See *Carson v. Carson*, 6 Allen, 299; *Miller v. Congdon*, 14 Gray, 114. However unusual in extent and character may be the functions thus exercised by him, the executor is bound to a just and rightful performance; and his official bond, though expressed after the ordinary tenor, stands as security that the obligations he has incurred shall be faithfully performed in all respects. *Wms. Exrs.* 1399, and Perkins's note; *Dorr v. Wainwright*, 13 Pick. 328; *Sheet's Estate*, 52 Penn. St. 257; *Lansing v. Lansing*, 45 Barb. 182.

³ *Jacques v. Chambers*, 2 Coll. 435; 2 Redf. Wills, 487; *Wms. Exrs.* 1440.

⁴ In such case the legatees may well abide by the executor's selection, if they cannot agree; but, otherwise, equity must decide. *Ib.*

§ 487. **Method of Paying General Legacies ; Currency, etc. —** The presumption is that general legacies shall be paid in lawful money.¹ But a testator may require any general legacy to be paid in a particular currency or coin, or in specified securities or property.²

§ 488. **Assent of the Executor to a Legacy. —** The theory of our law is, that the title of a legatee, whether specific or general, does not become complete and perfect, until the executor assents to the legacy.³ But, as an executor's wishes are not to control those of his testator, the object of the requirement appears to be nothing more than to await the executor's reasonable convenience. Consequently, a legatee has no right to take possession of his legacy and exercise full dominion over it, pending administration; nor could the testator himself have conferred such a privilege without imperiling prior rights.⁴ Even though the legacy were of a specific chattel, trespass, trover, replevin, and other remedies founded in possessory rights, are inappropriate to the legatee's title before the executor has surrendered his own;⁵ nor should the legatee's sale and transfer give an indefeasible title to the purchaser.

Should, however, the executor unreasonably withhold his assent to the legacy, a court of equity will compel him to

¹ Rates of exchange in payments will be reckoned accordingly. *Wms. Exrs.* 1433-1435; *Lansdowne v. Lansdowne*, 2 Bligh, 91; *Bowditch v. Soltyk*, 99 Mass. 136; *Yates v. Maddan*, 16 Sim. 613.

² *Sheffield v. Lord Coventry*, 2 Russ. & My. 317; *Banks v. Sladen*, 1 Russ. & My. 216; *King v. Talbot*, 50 Barb. 453.

An executor is not bound to search out a legatee; it is enough if he is always ready when called upon to pay the legacy. *Thompson v. Youngblood*, 1 Bay (S. C.) 248; *Hemphill v. Moody*, 62 Ala. 510. Yet, as the executor must be ready to pay interest on the legacy after one year, he should invest the

amount or else pay it into court to be invested. *Lyon v. Magagnos*, 7 Gratt. 377; *supra*, § 323.

A legatee or distributee may, if *sui juris*, receipt and release for what is due him. As to taking the fiduciary's own note for the amount, see *Lawton v. Fish*, 51 Ga. 647; 9 N. J. Eq. 314.

³ *Wms. Exrs.* 1372; *Northey v. Northey*, 2 Atk. 77; *Nunn v. Owens*, 2 Strobb. 101; 2 Redf. Wills, 461; *Refeld v. Belette*, 14 Ark. 148; *Lott v. Meacham*, 4 Fla. 144; *Crist v. Crist*, 1 Ind. 570; *Finch v. Rogers*, 11 Humph. 559.

⁴ *Wms. Exrs.* 1372.

⁵ *Northey v. Northey*, 2 Atk. 77; 2 Redf. Wills, 461.

yield it.¹ Assent, moreover, may be express or implied, the question being one of fact.² If the executor notifies the legatee that he is ready to pay whenever the legatee calls, there is a clear assent;³ but not where he merely congratulates;⁴ nor should the assent of one who is named executor avail where another qualifies and administers.⁵ A premature assent should not be readily inferred from doubtful acts or expressions.⁶

The effect of the executor's assent to a legacy is, that the specific thing bequeathed ceases at once to be part of the

¹ No action will lie at law to recover the legacy before assent is given, but equity regards the executor as a trustee, and compels him to assent where he ought to do so. *Lark v. Linstead*, 2 Md. Ch. 162; 2 Redf. Wills, 463; *Wms. Exrs.* 1375; *Nancy v. Snell*, 6 Dana, 148; *Price v. Nesbit*, 1 Hill Ch. 445; *Crist v. Crist*, 1 Ind. 570.

² 2 Redf. Wills, 464; *George v. Goldsby*, 23 Ala. 326; *Refeld v. Belette*, 14 Ark. 148; *Crist v. Crist*, 1 Ind. 570; *Elliott v. Elliott*, 9 M. & W. 27; *Bufaloe v. Baugh*, 12 Ired. 201.

³ *Barnard v. Pumfrett*, 5 My. & Cr. 70.

⁴ *Wms. Exrs.* 1376, criticising *Shep. Touchst.* 456.

⁵ *White v. White*, 4 Dev. & Bat. 401. If an executor assents before letters testamentary are issued to him, his assent will not pass the legal title nor bind the estate which he represents. *Gardner v. Gantt*, 19 Ala. 666. But English cases have held, relying upon the older doctrine so inconsistent with our modern legislative policy, that the executor's authority being derived from the will, he may assent before probate. *Wms. Exrs.* 303, 1378.

⁶ *George v. Goldsby*, 23 Ala. 326; *Wms. Exrs.* 1376; *Burkhead v. Colson*, 2 Dev. & Bat. Eq. 77.

Should the legatee have or gain possession of the thing bequeathed, without the executor's assent, the executor, it would seem, may recover it from him by action at law, in trespass or trover,

by virtue of his better title. *Wms. Exrs.* 1374; *Mead v. Orrery*, 3 Atk. 239; 2 Redf. Wills, 463. For, until after his assent to the legacy, the executor has not only a bare authority, but the interest in the thing bequeathed. 3 Atk. 235, 239. In general, the right to recover and collect assets is in the executor. And yet retention of the legacy for a considerable time, without complaint by the executor, may conclude the latter, if the thing or fund be not needed for administration; since assent may be given by acquiescence, and without an actual transfer of possession. *Andrews v. Hunneman*, 6 Pick. 126; *Spruil v. Spruil*, 2 Murph. 175; *Jordan v. Thornton*, 7 Ga. 517; *Eberstein v. Camp*, 37 Mich. 176. When executors die, after the debts are paid, but before the legacies are satisfied, their assent will sometimes be presumed. *Cray v. Willis*, 2 P. *Wms. Exrs.* 531; *Wms. Exrs.* 1377. So may the executor's assent be given conditionally instead of absolutely. *Wms. Exrs.* 1378; *Lillard v. Reynolds*, 3 Ired. 366. In short, assent may be inferred either on the presumption that an executor meant to do what was his duty, or from some act or expression on his part which recognized the legatee's present right to receive the legacy. See *per curiam* in *George v. Goldsby*, 23 Ala. 326. Where there are joint executors, the assent of one will suffice. *Wms. Exrs.* 948, 1378; *Boone v. Dyke*, 3 T. B. Mon. 529.

testator's assets, and the legal title of the legatee thereto becomes perfect ;¹ and this notwithstanding the assets prove afterwards insufficient to pay the debts.²

As to legacies not specific, the practical effect of the executor's mere assent appears of less consequence, as in the former case, to deliver it. There ensues a sort of contract obligation to pay the legacy, which obligation may be enforced in equity ; but, unless a specific fund has been set aside in consequence, nothing can be identified upon which the legatee's legal title actually attaches.³

Where the executor is himself a legatee, assent to his own legacy is needful. And, until his express or implied assent to the legacy has been given in such a case, the qualified executor holds the specific thing or fund in his representative capacity, even though all the debts have been paid ; for the rule is, that one's assent cannot be inferred from acts equally applicable to the title of legatee and executor.⁴

§ 489. **Legatee's Assent to the Legacy.**— There is another element in the acquisition of title to a legacy : namely, the legatee's assent. A will being once established in probate, each legatee is readily presumed to assent to his own legacy, whether larger or smaller than what he might reasonably have expected. Yet the legatee's assent to his legacy is a legal pre-requisite to the completion of the gift ; for no one can be made the beneficiary of another against his own will ; and, where a bequest is coupled with onerous conditions or trusts, as in various instances of charity, or some public corporation is legatee, a formal acceptance or assent will often precede with propriety the payment or delivery by the executor. The simple bequest to an individual, however, is usually assumed to have been accepted unless positively declined ; and an actual acceptance without reservation of the money or specific thing bequeathed concludes the matter. Should the legatee

¹ *Nancy v. Snell*, 6 Dana, 148.

² *Ib.*

³ *Andrews v. Hunneman*, 6 Pick. 129 ;
Wms. Exrs. 1372 ; *Dunham v. Elford*,
13 Rich. Eq. 190.

⁴ *Doe v. Sturges*, 7 Taunt. 223 ; Com.
Dig. Adm. 6 ; Wms. Exrs. 1382. See
Murphee v. Singleton, 37 Ala. 412. As
to dispensing with assent, see 2 Sm. & M.
527.

refuse to accept, and disclaim all title to the legacy, his refusal or relinquishment given *sui juris*, would operate to divest his interest, and subject the property thus bequeathed to distribution as in the case of intestacy.¹

§ 490. **Abatement of Legacies in Case of Deficient Assets.** — Next in order, after collecting the assets and paying or providing for the due adjustment of all valid debts, claims, and charges against his testator's estate, an executor naturally regards the delivery of specific legacies; for these are not to be abated under ordinary circumstances, being answerable for debts only as a last resort, and for general legacies scarcely at all.² If, however, the will creates exceptional conditions, as where general legacies are made an express charge upon the specific legacies or upon the personal property, and there is no other fund which can satisfy such bequests, the rule is different.³

So long as there remain assets not specifically bequeathed to appropriate to legal debts and charges against the estate, specific bequests cannot be disturbed, though general legacies be swallowed up; it is only when residuary and other general legacies sacrificed, nothing remains of the personal estate for satisfying legal debts and charges but what was specifically bequeathed, that specific and demonstrative legatees can be compelled to contribute; and, in such case, abatement shall be proportioned to the value of their respective legacies.⁴

¹ Walker v. Bradbury, 15 Me. 207. Where, of cumulative bequests to the same person, one is onerous and the other beneficial, the legatee cannot accept one and reject the other; nor, of course, can a legacy be accepted apart from its essential restrictions; there must be acceptance *in toto* or rejection *in toto* of what the testator has bequeathed to him. Talbot v. Radnor, 3 My. & K. 254. But the intention of the testator expressed in the will controls the question. Long v. Kent, 11 Jur. N. S. 724; Wms. Exrs. 1448.

² Wms. Exrs. 1359, 1360; 2 Redf. Wills, 450.

³ Prec. Ch. 393; White v. Green, 1 Ired. Eq. 45; 25 N. Y. 128. Demonstrative legacies have a presumed security for their payment, and do not abate with general legacies. *Supra*, § 461; 4 Ves. 150; Creed v. Creed, 11 Cl. & Fin. 509.

⁴ Barton v. Cooke, 5 Ves. 461; Sleech v. Thorington, 2 Ves. Sen. 561; Wms. Exrs. 1371; 2 Redf. Wills, 450. The doctrine of marshalling assets is specially considered in connection with the charge or exoneration of real estate; but as to personalty generally, regarded as assets for debts and legacies, and where the will has made no express directions to

General legacies rank together; so that whatever remains over and above satisfying the legal debts, demands, and charges against the estate and specific legacies, must be applied to general legacies in proportion to their amount, until they

the contrary, a deficiency of assets is to be made up, by charging these classes in order: (1) Residuary legacies; (2) general legacies, with the exception of (3) legacies given for a valuable consideration; (4) specific and demonstrative legacies. We apprehend, however, that, as concerns a partial deficiency, this order may be varied considerably, by explicit language in the will, giving precedence out of course to a particular legacy. *Lewin v. Lewin*, 2 Ves. Sen. 415; *Marsh v. Evans*, 1 P. Wms. 668.

Legacies given for a valuable consideration are preferred to other general legacies, when abatement is necessary, because, doubtless, of their *quasi* obligatory character. *Burridge v. Bradyl*, 1 P. Wms. 127; *Ambl.* 244; *Blower v. Morret*, 2 Ves. Sen. 420; *Norcott v. Gordon*, 14 Sim. 258; *Wms. Exrs.* 1364; 2 *Redf. Wills*, 452; *Wood v. Vandemburgh*, 6 Paige, 277; *Clayton v. Akin*, 38 Ga. 300; *Pollard v. Pollard*, 1 Allen, 490. It might be thought that, regarded as debts, they should, to the extent of the consideration, and not farther, rank above all legacies, even specific ones; but courts do not appear to apply this preference with so nice a sense of justice; and, on the one hand, specific legacies will take full precedence, while, on the other, as among general legacies, these have been excepted to their full amount, even though the bequest should exceed the value of its actual consideration. *Towle v. Swasey*, 106 Mass. 106; *Ambl.* 244. Among general legacies thus privileged, are those given in consideration of a debt actually owing to the legatee, or of the relinquishment of a widow's dower. *Burridge v. Bradyl*, and other cases cited *supra*. It is essential, however, to this privilege, that the consideration should

subsist at the testator's death; and, hence, legacies given to creditors whose claims had been compounded and released during the life of the testator, *Davies v. Bush*, 1 Younge, 341; *Coppin v. Coppin*, 2 P. Wms. 291; or provisions nominally in lieu of dower, where the testator has left no dowable lands, are voluntary merely. *Acey v. Simpson*, 5 Beav. 35; *L. R.* 3 Ch. D. 714. And the same may be said of a legacy given to pay off another person's debts. *Shirt v. Westby*, 16 Ves. 396. The meritorious object of a voluntary bequest, moreover, will not entitle it to pre-eminence above other general legacies given by way of bounty; and, aside from provisions which properly defray the incidental expenses of funeral and administration, legacies given for mourning rings, or to recompense executors for their care and trouble, are liable to abatement in the usual proportion. *Apreece v. Apreece*, 1 Ves. & B. 364; *Fretwell v. Stacy*, 2 Vern. 434; *Duncan v. Watts*, 16 Beav. 204; *Wms. Exrs.* 1366. In American States, however, where compensation is regularly allowed to executors for their services, a legacy given by way of recompense might, perhaps, be pronounced a legacy upon valid consideration; but, even were it abated, the executor would not be thereby debarred, we presume, from receiving his full compensation on the usual footing of such officials. The report, in 1 P. Wms. 423, appears to sanction the exemption of a legacy left for building a monument to the memory of a relation; but there is here some error. See *Wms. Exrs.* 1366, and note; 1 *Bro. C. C.* 390; 6 Paige, 277. Legacies to servants, or for charities, cannot claim precedence. *Attorney General v. Robins*, 2 P. Wms. 25; *Wms. Exrs.* 1366; 2 *Redf. Wills*, 453.

are fully paid.¹ It follows, that where the estate is scarcely enough, or less than enough, to pay such general legatees in full, the residuary legatee must be the sufferer.²

§ 491. **The Refunding of Legacies after their Payment.**—The general rule appears to be well settled, that, after the executor has once voluntarily paid a legacy without reservation, he cannot at discretion force the legatee to refund.³ Where, however, the assets are found deficient for meeting the lawful debts and charges, the executor may, by a bill in equity, compel legatees to refund what may have been already overpaid to them;⁴ though equity will not make legatees refund for the sake of repairing losses occasioned by the executor's waste;⁵ nor while unappropriated assets remain for administration purposes.⁶

Creditors cannot, however, be debarred of their prior rights by the executor's imprudence or misconduct, but may in all cases pursue assets into the hands of legatees, where their own lawful demands remain unsatisfied; and the satisfied legatee, whether paid by the executor voluntarily or under the sanction of chancery, may, by chancery, be compelled to refund.⁷ Where chancery has administered the fund, how-

¹ 2 Redf. Wills, 450; Wms. Exrs. 1359; Mollan v. Griffith, 3 Paige, 402.

² *Ib.*

The usual priority among legatees may be varied by the special directions of the will. See *Dey v. Dey*, 4 C. E. Green, 137; *Lewin v. Lewin*, 2 Ves. Sen. 415; *Marsh v. Evans*, 1 P. Wms. 668; *Brown v. Brown*, 1 Keen, 275; *Haynes v. Haynes*, 3 De G. M. & G. 590; *Towle v. Swasey*, 106 Mass. 100. Local statutes, too, may be found to modify the rule. See, as to a post-testamentary child, 5 Paige, 588.

³ *Orr v. Kaines*, 2 Ves. Sen. 194; *Coppin v. Coppin*, 2 P. Wms. 296; 5 Cranch, C. C. 658; 2 Redf. Wills, 457; Wms. Exrs. 1450. Local statutes sometimes change this rule.

⁴ Wms. Exrs. 1451; 1 Chanc. Cas. 136; *Davis v. Newman*, 2 Rob. (Va.)

664. The executor should come into the court "with clean hands," if he expects equity to aid him. See 77 N. C. 357.

⁵ *McClure v. Askew*, 5 Rich. Eq. 162. If he volunteers to pay legacies, with full knowledge of outstanding debts, he may have to bear the penalty of his own imprudence. *Harkins v. Hughes*, 60 Ala. 316.

⁶ 1 La. Ann. 214. The executor's prudent course is to take a refunding bond from legatees, as against claims which may afterwards be presented within the time allowed by law; unless the estate is ample. *Supra*, § 478.

⁷ Wms. Exrs. 1451; 1 Vern. 162; *March v. Russell*, 3 My. & Cr. 31; *Davies v. Nicholson*, 2 De G. & J. 693; *Buie v. Pollock*, 55 Miss. 309.

ever, a particular legatee may be required to refund only his proportionate share.¹ And it would appear consistent with our American probate practice to cause unsatisfied creditors, where the deficiency was occasioned by maladministration, to exhaust their remedies first against the executor or administrator and the sureties on his official bond.²

As among legatees, moreover, no one of them shall be allowed an unjust precedence, because of an executor's favor or misapprehension, where the assets were not originally sufficient, in fact, to pay all in full; but in such case equity will compel the legatees thus overpaid to contribute so as to make the whole proportionate abatement what it should have been.³

¹ Gillespie *v.* Alexander, 3 Russ. 130.

² Pyke *v.* Searcy, 4 Port. 52.

³ Walcott *v.* Hall, 1 P. Wms. 495; Wms. Exrs. 1452; 2 Redf. Wills, 458; Gallego *v.* Attorney General, 3 Leigh, 450. Otherwise, where assets, originally sufficient, have been wasted

by the executor. See Wms. Exrs. 1452; 2 Redf. Wills, 458; Evans *v.* Fisher, 40 Miss. 644. Trust funds, misapplied and distributed by the executor among legatees, may be recovered by a bill in equity. Green *v.* Givan, 33 N. Y. 343.

CHAPTER V.

PAYMENT AND DISTRIBUTION OF THE RESIDUE.

§ 492. **Residue of Personal Estate goes according to Testacy or Intestacy of Deceased.**— After the payment of debts and (if there be a will) of specific and general legacies, the final duty of the executor or administrator is to pay over or deliver what residue or surplus of the assets may remain to the person or persons duly entitled to the same. In case of testacy, the residuary legatee or legatees, or, as the case may be, trustees selected to hold the residue for the purposes contemplated by the will, are the proper parties ; but, where one died intestate, the residue goes to the person or persons designated by law and the statute of distributions. These two cases we now proceed to consider separately.

§ 493. **I. As to the Residue in Case of Testacy.**— *First*, as to the case of testacy. After an executor has settled all lawful debts and charges against the estate which he represents, and has paid or delivered all the general and specific legacies according to the tenor of the will, he should transfer whatever personal property remains to the residuary legatee or legatees, if such there be.¹ And if such legatee dies after the testator, and pending a final settlement of the estate, his personal representatives will take the residue in his right.² Subject to the directions of the will, and such legatee's convenience, this residuary fund is turned over in money or other kinds of personalty, as the proceeds of a prudent administration.

¹ Wms. Exrs. 1454; 2 Redf. Wills, 487. clear and tangible interest in the residue, and the next of kin stand, with

² Brown v. Farndell, Carth. 52; Cooper v. Cooper, L. R. 7 H. L. 53. A residuary legatee, under a will, has a regard to an intestate estate, in the same condition. Cooper v. Cooper, ib.

§ 494. **Right of the Executor where there is no Residuary Legatee named.**—Formerly it was contended in the English courts, more out of favor to the individual upon whom the deceased had bestowed his confidence than upon any rational theory of interpretation, that if a testator had named in his will an executor, but no residuary legatee, the executor should retain the residue of the personal estate for his own benefit, after settling all debts and charges, and paying whatever legacies were duly bestowed. For, inasmuch as the personal estate had devolved upon the executor in the first instance, there the surplus legally remained.¹ So unsatisfactory was the doctrine, however, that though equity gave formal adhesion to this common-law rule, they made exceptions wherever they might;² and, in 1830, Parliament declared explicitly that, for the future, unless the will directed otherwise, the executor must be deemed, in all such cases, a trustee for the persons entitled to the estate under the statute of distributions.³ Generally, if not universally, in the American States, the executor has been considered a trustee for the next of kin as to all residue in his hands undisposed of; and American statutes a hundred years old repudiate the notion that a beneficial interest should vest in him by virtue of his office.⁴

The fact, that the next of kin is likewise executor, does not, of course, disentitle him from taking beneficially the residue

¹ *Attorney General v. Hooker*, 2 P. Wms. 338; *Urquhart v. King*, 7 Ves. 288; Wms. Exrs. 1474, 1475.

² *Ib.*; *Langham v. Sanford*, 17 Ves. 435; *Middleton v. Spicer*, 1 Bro. C. C. 201; *Taylor v. Haygarth*, 14 Sim. 8.

³ Act 11 Geo. IV. & Wm. IV. c. 40; Wms. Exrs. 1476. The established equity rule, previous to this act, was that, where it may well be presumed that the testator meant to confer the office without the beneficial interest in the residue, the executor must be considered a trustee for the next of kin of the testator; or, if there be no known kindred, a trustee for the crown. 1 Bro. C. C. 201; *Taylor v. Haygarth*, 14 Sim. 8. The effect of this statute appears to

be to put the burden of proof on the executor to show that the testator intended he should enjoy the residue beneficially. *Juler v. Juler*, 29 Beav. 34. But the statute is considered to apply only in cases where the testator has left next of kin; and, accordingly, where there is no known next of kin, the executor will take the residue as against the crown, unless the intent of the testator to exclude his executor affirmatively appear. 2 Coll. 648. For the English decisions under this statute, see Wms. Exrs. 1474-1482, and cases cited.

⁴ 2 Story Eq. Jurisp. § 1208; Wms. Exrs. 1474, and cases cited; *Hays v. Jackson*, 6 Mass. 149; 2 Redf. Wills, 491; *Wilson v. Wilson*, 3 Binney, 557.

which otherwise would have vested in him.¹ But a pecuniary legatee's interest is not enlarged constructively by his appointment as an executor.² It has been held that a testator cannot by negative words exclude any or all of his next of kin from sharing beneficially his undisposed of residue, but must give it expressly to some one else, if he means to cut off such kindred's right to share.

§ 495. II. *As to the Residue in Case of Intestacy; Statutes of Distribution.* — *Secondly*, as to payment or delivery of the residue in case of intestacy. As the law of England anciently stood, the ordinary, succeeding to the king's right, himself appropriated the residue of an intestate's estate, as though for pious uses, giving certain portions to widow and children, if there were any. Later statutes compelled administration to be granted to the next relatives of the deceased; but here the immediate result was, that the person selected for the trust might make the office lucrative for himself, by enjoying the surplus, to the exclusion of other equal kindred to the intestate. For, as the temporal courts finally decided, the ordinary had no power to compel a distribution, notwithstanding such authority had long been assumed.³

To this unsatisfactory state of the law we owe the first of our formal statutes of distribution, — one of those excellent enactments, following the Restoration, which have placed English jurisprudence upon a sound modern establishment. This act provides in detail for distributing justly and equally the surplus of all intestate estates amongst the wife and children, or children's children, if any such be, or otherwise to the next of kindred to the dead person in equal degree, or legally

¹ Mass. Stat. 1783, c. 24, § 10.

² *Browne v. Cogswell*, 5 Allen, 556. See *Reeve's Trusts*, *Re*, L. R. 4 Ch. D., as to a bequest to an executor, but not in that character. Negative words will not suffice to exclude any of one's next of kin from sharing beneficially in a residue undisposed of. *Clarke v. Hilton*, L. R. 2 Eq. 810.

³ 2 Bl. Com. 515; *Edwards v. Freeman*, 2 P. Wms. 441; *Wms. Exrs.* 1483;

1 Lev. 223. The spiritual courts had required administrators to give bonds, with condition to distribute; and statute 2 Hen. VIII. c. 5, expressly sanctioned "taking surety" of the person to whom such office was committed. It appears, too, to have been the custom, moreover, to divide an intestate's personal estate among his next relatives. Stat. 21 Hen. VIII. c. 5, § 3; *Wms. Exrs.* 529; *supra*, §§ 7, 139.

representing their stocks, *pro suo cuique jure*.¹ By this same statute the ordinary spiritual court was empowered to take bonds, with sureties, from all administrators on their appointment, conditioned not only to exhibit an inventory, and administer the estate well and truly, but likewise to render a just account of one's administration, and deliver and pay the residue found due to such person or persons as the court should decree, pursuant to the terms of this act.²

Statutes are to be found in all of the United States expressly directing the distribution of an intestate's personal, as well as the descent of his real estate, and differing in various details from one another, though based upon the English statute of Charles II.³ It is likewise the American

¹ Stat. 22 & 23 Car. II. c. 10. Details are given in Wms. Exrs. 1434, at considerable length. Admirable as is the policy of this statute, some English jurists have considered it, to use Lord Hardwicke's words, "very incorrectly penned." *Stanley v. Stanley*, 1 Atk. 457.

From the operation of this act were expressly excepted customs previously observed within the city of London, the province of York, and other places. The custom of the city of London, which is the remnant of the old common law on the subject (see Lord Macclesfield, *Prec. Ch.* 596), distributed according to the ancient doctrine of *pars rationabilis*. This, in substance, divided the surplus into three parts where widow and children survived the intestate; the widow taking one-third, the children one-third, the administrator one-third. If only a widow or only children survived, such widow or such children took one moiety and the administrator the other. If there was neither widow nor child surviving, the administrator had the whole; his portion being known as the "dead man's part" or "death's part." It was this "dead man's part" which the ordinary or administrator formerly applied, or might apply, to his own use, until the statute 1 Jac. II. c. 17, required it, despite custom, to be subject to the statute

of distributions; a statute which doubtless would have passed much earlier, had not widow and children (who had, we must remember, the choice of administrator) been treated, if surviving, with tolerable fairness, and the chief hardships of the law bearing upon the more remote kindred. The custom of London made deduction for "the widow's chamber," or her apparel and the furniture of her bedchamber. Customs of York and other places were quite similar to that of London. But by stat. 19 & 20 Vict. c. 94, all these customs are abolished as to the estates of persons dying on or after January 1st, 1857. The cases under this head, which in England are becoming rapidly forgotten, and afford to American readers interest only as a curious historical study, will be found collated in Wms. Exrs. 1527-1549.

² See stat. *ib.*; Wms. Exrs. 530, 531, 1484. As to language used in the court of probate act, stat. 20 & 21 Vict. c. 77, which substitutes probate jurisdiction for that of the old spiritual courts, see Wms. Exrs. 292. Under modern English practice, accordingly, the bond runs as conditioned to pay the residue to the persons entitled under the statute of distributions.

³ 2 Kent Com. 426, and notes.

rule to require account and distribution by the administrator, under the direction of the probate court, and to insert corresponding conditions in the administration bond.¹

The persons among whom distribution should be made, and the method of making distribution, must therefore be determined by local statutes, and the procedure of the courts under them. But the rights and method of distribution, English and American, deserve some further attention.

§ 496. **Surviving Husband's Right to the Residue of his Deceased Wife's Personalty.** — Under the English statutes (and perhaps at common law), not only is the surviving husband entitled to administer upon his wife's estate in preference to all others, but, subject to the payment of such debts as bind him upon surviving her, he recovers her outstanding personal property to his own use and enjoyment. His interest is a peculiar one, moulded by the peculiar laws of coverture; and he is said to administer for his own benefit when he administers at all, and to acquire a title to his wife's personalty, fitly designated as a title *jure mariti* under the statutes of distribution.²

So greatly, however, have the ancient rights of husband and wife been changed by modern legislation, both in England and the United States, that the present legal rule on this subject cannot be stated with precision.³

§ 497. **Surviving Wife's Rights in the Distribution of her Deceased Husband's Personalty.** — The English statute of dis-

¹ *Supra*, § 140.

² *Clough v. Bond*, 6 Jur. 50; *Schoul. Hus. & Wife*, § 403; 2 Bl. Com. 515; *Watt v. Watt*, 3 Ves. 246.

³ 2 Kent Com. 136; *Barnes v. Underwood*, 47 N. Y. 351; *Cox v. Morrow*, 14 Ark. 603; *Nelson v. Goree*, 34 Ala. 565; *Baldwin v. Carter*, 17 Conn. 201; *Woodman v. Woodman*, 54 N. H. 226; *Wilson v. Breeding*, 50 Iowa, 629; *Holmes v. Holmes*, 23 Vt. 765. See statutes of the several States regulating this subject; also *Schoul. Hus. & Wife*, §§ 405-409, and cases cited. The stat-

ute 29 Car. II. was never in force in Illinois; and the husband must distribute according to the local statute of distributions. *Townsend v. Radcliffe*, 44 Ill. 446.

As to curtesy at the common law, or the surviving husband's potential life interest, in his wife's lands, where a child was born of the marriage, and substitutes for this right under some late American statutes, see *Schoul. Hus. & Wife*, §§ 417-423; 2 Kent Com. 134; 1 Washb. Real Prop. 128.

tributions preserves the "widow's thirds," which the ancient common law bestowed as her *pars rationabilis*; the remaining two-thirds going to the children of the intestate or their representatives.¹ The statute further provides, as likewise did the ancient law, that when the husband dies intestate, leaving a widow only, and no lineal descendant, the widow shall have a moiety or half of his personal estate; giving a husband's next of kin the other half. Not more than one-half can the widow take by distribution, under any circumstances; for, where there are no next of kin, the other half goes to the crown.²

In this country the statute of Charles II. is at the basis of our legislation regarding the estates of intestates; but various modifications are found in the several States, to the greater favor of the surviving wife; and modern legislation at the present day is capricious in this respect, though tending to equalize the rights of surviving spouses in one another's property.³

§ 498. **Rights of Children and Lineal Descendants in Distribution.**—The English statute directs an equal distribution among the children of an intestate, after deducting the widow's third; or, if there be no widow, the entire residue is portioned equally among them. Where the intestate has left only one child, the statute by implication provides for such child, giving him the entire two-thirds, or, in case of no surviving widow, the entire residue.⁴

If any child was dead at the time of the intestate parent's death, and yet left a child or children of his own then surviving, such child or children will take their own parent's

¹ Stat. 22 & 23 Car. II. c. 10. The statute and custom of London, taken together, so as to divide the "death's part" between widow and children, provided more favorably for the widow than the statute alone; which last, it is observed, virtually bestows the "death's part" upon the children to increase their portion, exclusive of the widow. Wms. Exrs. 1530. *Supra*, § 495, *n*.

² 2 Bl. Com. 515, 516; 2 Kent Com.

³ 427; Schoul. Hus. & Wife, § 427; Cave v. Roberts, 8 Sim. 214.

⁴ See Schoul. Hus. & Wife, § 427, and appendix; the latest local codes; 2 Kent. Com. 11th ed. 427, 428.

A surviving spouse's rights may be barred by antenuptial settlement, etc. Schoul. Hus. & Wife, § 363. Divorce excludes such rights. Schoul. Hus. & Wife, §§ 558, 559.

⁵ Wms. Exrs. 1495, 1497; Carth. 52.

share in the intestate's personalty, by what is termed the "right of legal representation."

This right of representation extends to lineal descendants in the remotest degree, the descendants of a deceased heir, as a class, being substituted to the share their own parent would have taken if living;¹ though exclusive of such parent's widow. But representation applies only where one or more of them of a nearer degree to the intestate survived him, while such as did not, left lineal descendants instead, the right to take *per stirpes*, thus equalizing a distribution among those of the nearest degree; for, were all the children of the intestate dead, and only grandchildren left, the grandchildren would be, in fact, the next of kin surviving, and, as equal members, take *per capita*; while, as between grandchildren and the surviving children of a deceased grandchild, supposing such a case to have occurred, the right of representation as *per stirpes*, would once more operate.² American statutes, while recognizing these general rules, specify how far the right of representation shall apply; a principle which might well avail among collateral kindred, and in landed inheritance, but whose extent, under the act 22 & 23 Car. II., is not precisely determined.³

Children of the half blood are entitled to a share equally with those of the whole blood; a rule applicable where the parent married more than once, and had offspring by the different marriages.⁴ And this rule extends generally to kindred of the half blood in the same degree. A posthumous child, too, or one born after the death of the parent, inherits, whether of the whole or half blood, in the same manner as if

¹ Price v. Strange, 6 Madd. 161; 3 Bro. C. C. 226; Wms. Exrs. 1496.

² 2 Bl. Com. 517; Bac. Abr. tit. Exors. I. 3; Wms. Exrs. 1497, 1498.

³ *Semble*, that, as long as there are lineal descendants, the division must be *per stirpes*. See Ross's Trusts, L. R. 13 Eq. 286. Inheritance or succession "by right of representation" takes place when the descendants of a deceased heir take the same share or right in the

estate of another person that their parent would have taken if living. Mass. Pub. Stats. c. 125, § 6. And see North's Estate, 22, 48 Conn. 583.

⁴ 1 Mod. 209; Carth. 51; Wms. Exrs. 1496; 2 Kent Com. 424; Crook v. Watt, 2 Vern. 124. Children by different fathers or by different mothers may be brothers or sisters of the "half blood," in the sense of that word, as it appears.

born during the lifetime of the parent and surviving him.¹ On such points, statutes of distribution in our American States are sometimes found explicit ; providing, also, for other cases, where the common law was either harsh or uncertain, as in the instance of illegitimate children.² So highly favored are the equal rights of children or lineal descendants in this country, that provisions may be found in our various codes, restraining the parental right, or, at all events, presuming strongly against the parental intention to deprive any one of them of the equal benefits of his will.³

§ 499. **Advancements to Children ; How reckoned in Distribution.**—By the English statute of distributions, portions are taken into account ; and, if the father, during his lifetime, makes an advancement to any of his children, towards their distributive share, the rule is to deduct this in making distribution.⁴

¹ 2 Kent Com. 424; *Edwards v. Freeman*, 2 P. Wms. 446; Wms. Exrs. 1497. And see Mass. Pub. Stats. c. 127, § 22.

² Mass. Pub. Stats. c. 125, §§ 3-5. The rights and disabilities of illegitimate children, as well as the status of legitimacy, are subjects considered at length in Schoul. Dom. Relations, Part III. cs. 1, 6.

³ Mass. Pub. Stats. c. 127, § 21; 2 Kent Com. 421; 4 Kent Com. 471.

⁴ Stat. 22 & 23 Car. II. c. 10, § 5; Wms. Exrs. 1485, 1498; *Edwards v. Freeman*, 2 P. Wms. 435; 2 Bl. Com. 517. As to the deceased father, the statute takes away nothing which has been once received by a child; but only his distributive share can be affected by such computation, unless he chooses to relinquish more; and the rule of hotchpot applies only to cases of actual and complete intestacy. *Walton v. Walton*, 14 Ves. 324; *Edwards v. Freeman*, 2 P. Wms. 443. Bringing an advancement into hotchpot is intended for the benefit of children, and not the widow; but, as among children, the rule extends to those who succeed to a deceased child's share by the right of representation.

Kircudbright v. Kircudbright, 8 Ves. 51; *Proud v. Turner*, 2 P. Wms. 560. But grandchildren who take *per capita* need not thus account for advancements to their respective parents deceased. *Skinner v. Wynne*, 2 Jones (N. C.) 41.

Lands received by settlement upon a younger child, and charges upon such land, have been included within the English statute under the rule of advancements. 2 P. Wms. 441; Wms. Exrs. 1500, 1501. And so have provisions by marriage settlement and pecuniary portions. Wms. Exrs. 1502; *Edwards v. Freeman*, 2 P. Wms. 440. Where a father settles upon his son on the latter's marriage, all the limitations to the wife and children of such son should be considered part of the advancement. *Weyland v. Weyland*, 2 Atk. 635. As to what shall constitute an advancement of the latter description, the acts of the father appear to have been often construed in England with less reference to actual intention of the parties than the requirement of equal justice. See, e.g., Wms. Exrs. 1502-1505; 2 Redf. Wills, 908, 909; 1 Atk. 403; 8 Ves. 51; 2 P. Wms. 435; 31 Beav. 583; *Boyd v. Boyd*, L. R. 4

§ 500. **Advancements to Children ; American Rule.** — To discriminate carefully under such maxims must be difficult ; and, in this country, the rule of advancements does not appear to be so strict, more stress being usually laid upon mutual intention at the date of the transaction, than upon the equity of distributing to all children alike. It is true that advancements are in some States reckoned by a legal inference similar to that which the English cases uphold ; nor is it unfrequently held that a gift, either of land or money, which is made to a child or heir, by a person who afterwards dies intestate, shall be presumed an advancement ;¹ as where, for instance, the provision was calculated to aid directly and advance the child when starting in life. But, generally, all such presumptions may be readily overcome by proof of actual intent ;² while, in some States, the statutes of distribution, unlike the English, permit nothing to be reckoned as an advancement to a child by the father, unless proved to have been so intended, and chargeable on the child's share by certain evidence prescribed.³

Eq. 305; *Bennett v. Bennett*, L. R. 10 Ch. D. 474.

¹ See *Meadows v. Meadows*, 11 Ire. L. 148; 2 Story Eq. Juris. § 1202; *Parks v. Parks*, 19 Md. 323; *Grattan v. Grattan*, 18 Ill. 167; *Creed v. Lancaster Bank*, 1 Ohio St. 1; *Wms. Exrs.* 1502, *u.* by Perkins; 4 Kent Com. 419; *Hollister v. Attmore*, 5 Jones Eq. 373; *Fellows v. Little*, 46 N. H. 27.

² *Smith v. Smith*, 21 Ala. 761; *Parks v. Parks*, 19 Md. 373; *Phillips v. Chapel*, 16 Geo. 16; *Bay v. Cook*, 31 Ill. 336.

³ Mass. Gen. Stats. c. 91, § 6 *et seq.*; *Hartwell v. Rice*, 1 Gray, 587; 22 Pick. 508; 4 Kent Com. 418; *Porter v. Porter*, 51 Me. 376; *Adams v. Adams*, 22 Vt. 50; *Johnson v. Belden*, 20 Conn. 322; *Mowrey v. Smith*, 5 R. I. 255. See also Schoul. Dom. Rel. § 273; *Vanzant v. Davies*, 6 Ohio St. 52; *Vaden v. Hance*, 1 Head, 300; 2 Redf. Wills, 908, 909.

Hence it is laid down that whether a

certain provision made by the deceased during his lifetime be a gift or an advancement is a question of intention; but that, if it was originally intended by both parent and child as a gift, it cannot be subsequently treated by the father as an advancement, without at least the child's knowledge or consent. *Lawson's Appeal*, 23 Penn. St. 85; *Sherwood v. Smith*, 23 Conn. 516. On the other hand, promissory notes held by an intestate parent against his child, or the transfer of money upon an account stated, justify rather the presumption that there was a loan and not a gift or advancement intended. *Vaden v. Hance*, 1 Head, 300; *Bruce v. Griscom*, 16 N. Y. Supr. 280; *Batton v. Allen*, 5 N. J. Eq. 99; *West v. Bolton*, 23 Geo. 531. All such presumptions may be rebutted; and, to the facts and circumstances attending the transaction, and, likewise, to declarations of the one as part of the *res gestae*, and admissions by the other, much weight is attached.

The rule of bringing one's advancement, in real or personal estate, into *hotchpot*, if the child so desire, with the whole estate of the intestate, real and personal, so as to take his just proportion of the estate, prevails in several of the United States.¹ But this privilege of election to the child is by no means universally conceded.² The child who thus elects does not thereby relinquish his title to the advancement, but takes such a course to ascertain whether his share actually exceeds or falls short of an equal share.³ In this case, and, in general, wherever the value of an advancement is to be ascertained, the value of the property at the time of the advancement governs in the distribution, and interest should not be reckoned.⁴

One's advancement may be changed into a gift to the child; and one may, by his will, reduce expressly his surviving child's legacy out of consideration for special favors rendered; but the conversion of an absolute gift into an advancement or debt, so as to affect a child's right of distribution, in case of intestacy, is not to be accomplished by the mere acts and declarations of the parent subsequent to the transaction, and apart from the child's own assent to the change. *Green v. Howell*, 6 W. & S. 203; *Mitchell v. Mitchell*, 8 Ala. 414; *Manning v. Manning*, 12 Rich. Eq. 410; *Lawson's Appeal*, 23 Penn. St. 85; *Miller's Appeal*, 31 Penn. St. 337; *Sherwood v. Smith*, 23 Conn. 516. Evidence of the mutual intention, in short, is regarded with great favor where the deceased parent has not given express directions by his will; nor are entries and memoranda by the parent conclusive as to either the amount or the character of the transfer to his child. 5 Watts, 9, 80; Wms. Exrs. 1502, Perkins's *n*. The advancement being made and accepted, the incidents to an advancement follow. *Nesmith v. Dinsmore*, 17 N. H. 515. As under the English rule, there must be a complete act of the parent during his life divesting himself of the property to constitute

an advancement. *Crosby v. Covington*, 24 Miss. 619.

It is a general rule in the United States (confirmed by statute in some States), that while an advancement must be taken by a child towards his share, as regards a distribution of the estate, so as to abate or extinguish his distributive rights, no child shall be required to refund any part of the sum advanced to him, although it should exceed his share. *Black v. Whitall*, 9 N. J. Eq. 572; Mass. Gen. Stats. c. 91, § 6; *Cushing v. Cushing*, 7 Bush, 259.

¹ Wms. Exrs. 7th Eng. ed. 1499; *Jackson v. Jackson*, 28 Miss. 674; 2 Kent Com. 421; *Barnes v. Hazleton*, 50 Ill. 429; *Knight v. Oliver*, 12 Gratt. 33. Children with advancements, refusing to come into hotchpot, shall be disregarded in the distribution. *St. Vrain's Estate*, 1 Mo. App. 294.

² See Kent Com. 419, 421. Statutes are to be found in various States on this subject. *Ib.* Chancellor Kent does not appear to favor this special right of election, nor to consider the privilege of any consequence. *Ib.*

³ *Jackson v. Jackson*, 28 Miss. 674.

⁴ *Jenkins v. Mitchell*, 4 Jones Eq. 207; Wms. Exrs. 1498, *n*. by Perkins. For the New York rule, see *Beebe v. Estabrook*, 18 N. Y. Supr. 523. The

§ 501. **General Distribution among the Next of Kin.**— In default of surviving husband, widow, children, or lineal issue, the general rights of next of kin must be considered. Under the English and American statutes of distributions, next of kin more distant than children and their representatives, may, as we have seen, be entitled to share with the widow, or, in some of our States, with the surviving husband; but the statute rule is, that if there be no wife, surviving husband, or lineal issue, then all the estate must be distributed among the next of kin of equal degree. The rules of consanguinity already stated in connection with the right of taking out administration should here be applied once more.¹

Both English and American statutes regard the father with much favor under such circumstances; and under the statute 22 & 23 Car. II. c. 10, if the intestate thus dying left a father, the father was entitled to the whole of the personal estate to the exclusion of all others;² the mother coming next in order, but even thus, under the amended act, having to share with brothers and sisters of the deceased, if there were such.³ American policy tending, however, in later times, to place parents upon a more equal footing as to their own children, we find that some States now require distribution to father and mother in equal shares, where both survive; or, at all events, prefer, in degree, either surviving parent—the other being dead—to brothers and sisters of the deceased.⁴ It has been decided, under the English statute, that, in default of parents, the brothers and sisters of the deceased are to be preferred to a grandparent, notwithstand-

rule is sometimes defined by local statutes; as in Massachusetts, where the just proviso is found, in substance, that, if the value of the advancement was precisely expressed contemporaneously between the parties, this value shall be reckoned. Mass. Gen. Stats. c. 91, § 3; *Osgood v. Breed*, 17 Mass. 356; *Nelson v. Wyan*, 21 Mo. 347.

Concerning the sale of expectant estates by children, see Schoul. Dom. Rel. § 272; 1 Story Eq. Juris. §§ 336–339.

¹ *Supra*, § 101.

² Wms. Exrs. 1506; *Blackborough v. Davis*, 1 P. Wms. 51.

³ As to the mother's sharing with brothers and sisters, see stat. 1 Jac. II. c. 17; Wms. Exrs. 1506–1508, and cases cited. The English statutes on this point are carelessly drawn; but various American codes express the idea very clearly.

⁴ Mass. Pub. Stats. cs. 125, 135; *Oliver v. Vance*, 34 Ark. 564.

ing all, in legal strictness, are of the same degree;¹ and this preference, which is founded in natural reason, American codes have expressly conceded,² though grandparents are admitted to out-rank uncles and aunts, under the English reckoning.³

If the intestate leaves no husband, widow, or issue; and no father, mother, brother nor sister, his personal estate goes to his next of kin, in equal degree; and, as to these, our codes of distribution rarely specify more particularly the parties entitled. But, it is observable, that in various American States it is distinctly prescribed that the degrees of kindred shall be computed according to the rules of the civil law.⁴

Half-blood kindred, in the same degree, are to inherit equally with those of the whole blood, as our local statutes not unfrequently declare, and the English decisions concede.⁵

§ 502. **The same Subject.**—The English statute of distributions appears to have so limited the right of representation among collaterals as to exclude it, where the next of kin are more remotely related to the intestate than brothers and sisters; and hence, where the intestate leaves surviving an uncle or aunt and the son of another uncle or aunt deceased, the latter can take nothing; hence, too, surviving nephews and nieces become distributees, regardless of the child of a deceased nephew or niece.⁶ A corresponding limitation may be found, more or less precisely expressed, in American codes;⁷ which, likewise, incline to treat lineal kindred, and

¹ 2 Freem. 95; 3 Atk. 762, 763; Ambl. 191.

² See local codes.

³ Wms. Exrs. 1509, 1510. The Massachusetts statute (Gen. Stats. c. 93) provides, by way of qualifying the distribution among the next of kin in equal degree, that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through an ancestor who is more remote.

⁴ See Mass. Gen. Stats. c. 91, § 5; Swezey v. Willis, 1 Bradf. Sur. (N. Y.) 495.

⁵ The English cases extend this doctrine to posthumous brothers and sisters of the half blood. Watts v. Crooke, Show. P. C. 108; Burnet v. Mann, 1 Ves. Sen. 156; Wms. Exrs. 1511. And see Mass. Gen. Stats. c. 91, § 5.

⁶ 2 Vern. 168; Powers v. Littlewood, 1 P. Wms. 595; Wms. Exrs. 1486, 1512.

⁷ 2 Kent Com. 425; Parker v. Nims, 2 N. H. 460; Porter v. Askew, 11 Gill & J. 346; Bigelow v. Morong, 103

brothers and sisters, more favorably than more remote collateral kindred in respect of representation.

It should always be borne in mind, that as husband and wife are not legally next of kin to one another, so distribution, and those other rights which pertain to kinship, cannot be predicated of a mere connection by marriage; on the contrary, there must be common blood in the intestate and those claiming to be entitled to share as kindred. And among kindred are three classes: those in the descending line, those in the ascending, and those in the collateral.¹

§ 503. **Distribution where there is no Known Husband, Widow, or Next of Kin.**—Where the deceased intestate has left no husband, widow, or next of kin, the residue, after paying all assets, belongs, by English law, to the crown, as *ultimus haeres*;² and, under our American codes, the residue reverts or escheats in like manner to the State.³ But, while American policy appears to regard the State official who may thus receive the balance as a sort of trustee for the benefit of those who may have lawful claims thereon,⁴ and in final default of such claimants, for the public, it is held in England that the crown shall take the residue personally and beneficially. Indeed, English sovereigns have been accustomed to grant such property to their own favorites by letters patent or otherwise, reserving, perhaps, one-tenth part for the royal chest;⁵ though the long pendency of administration proceedings in chancery, under a bill in equity, may afford to absentees an ample opportunity to appear and assert their rights before such final distribution is awarded.

Mass. 287; Hatch v. Hatch, 21 Vt. 450; Adey v. Campbell, 79 N. Y. 52. And see further, as to children of deceased brother, etc., Conant v. Kent, 130 Mass. 178.

¹ Bouv. Dict. "Kindred." See, as between brother and the grandchild of a deceased brother, Suckley, Matter of, 18 N. Y. Supr. 344. And see table, *post*.

² Megitt v. Johnson, Dougl. 548; Taylor v. Haygarth, 14 Sim. 8.

³ See Mass. Gen. Stats. c. 95, §§ 12-15; Parker v. Kuckens, 7 Allen, 509; Fuhrer v. State, 55 Ind. 150; Leland v. Kingsbury, 24 Pick. 315.

⁴ Mass. Gen. Stats. c. 95, §§ 12-15.

⁵ Wms. Exrs. 433, 434, 1515; 2 Bl. Com. 505, 506. The estates of bastards, as of persons having no kindred, passed in like manner to the sovereign, by the common law.

§ 504. **Time and Method of Distribution.**— The due computation of that balance which serves as the basis of a rightful distribution is necessarily postponed to the lawful adjustment of debts due from the estate to its creditors; and hence the postponement of distribution. The English statute of distributions directs that no distribution shall be made till after a year from the intestate's death, and that distributees shall give bond to indemnify the administrator in rateable proportion if lawful debts afterwards appear.¹ American statutes proceed upon the same general theory; usually permitting, however, that the estate shall continue unsettled until the statute period for presenting claims (whether longer or shorter, and whether rightfully computed from the intestate's death or from the date of the administrator's appointment) shall have expired.

Upon a final settlement of the administration accounts, in American practice, distribution, if sought, should be granted.² Distribution, whether total or partial, may be applied for by the representative or by distributees, as local statutes frequently provide, after a certain period reasonably long for ascertaining the true surplus, and before a final settlement of the estate; a refunding bond being part of this proceeding, where the administrator continues responsible for claims upon the estate.³ But it is usual to postpone such decree until the time has fully elapsed for settling the debts. A decree for partial distribution is provided in the practice of some States; such decree being conclusive only as to the funds then distributable, and assets being reserved for further liabilities connected with the administration.⁴

Where the persons entitled are well known to the representative, both as to legal right and identity, payment is usually made without the formality of procuring a decree of distribution from the court.⁵

¹ Wms. Exrs. 1486; stat. 22 & 23 30 Ala. 78; Edgar v. Shields, 1 Grant Car. II. c. 10, § 8. (Pa.) 361; Hays v. Matlock, 27 Ind.

² Pritchett's Estate, *Re*, 52 Cal. 94; 49. And see Part VII. c. 1, *post*. Part VII. c. 1, *post*.

³ Lilly v. Stahl, 5 Ind. 447; Black-⁴ Kline's Appeal, 86 Penn. St. 363; Harrison v. Meadors, 41 Ala. 274; Curtis v. Brooks, 71 Ill. 125.

⁵ See Part VII. c. 1, *post*.
v. Delay, 34 Miss. 83; Johnston v. Fort,

§ 505. **Distribution where Real Estate has been sold to pay Debts.**—Distribution applies, in general, to personalty alone; real estate of the decedent descending to his heirs. The surplus of the proceeds of a sale of realty, after payment of debts, may be distributed among the heirs or those claiming under them.¹

§ 506. **Whether Distribution may be of Specific Chattels not reduced to Cash.**—In order to distribute strictly under a decree of distribution, the reduction of the surplus to cash would seem to be necessary. But such a course must sometimes be highly disadvantageous, in these times, especially where the estate is a large one; and it is preferable wherever the distributees can be brought into accord, to make a division specifically or in kind, save so far as a sale may have been necessary for the security and benefit of the estate in course of administration.² Under all circumstances, however, distributees should be equally dealt with, and upon a just valuation of the property, and the administrator should stand impartial as among them.³

As to the public administrator's final deposit of unclaimed balance, see Mass. Gen. Stats. c. 95; *Leland v. Kingsbury*, 24 Pick. 315; *Commonwealth v. Blanton*, 2 B. Monr. 393; *Fuhrer v. State*, 55 Ind. 150. But, if there be known kindred, a public administrator should distribute among them. *Parker v. Kuckens*, 7 Allen, 509.

¹ *Sears v. Mack*, 2 Bradf. (N. Y.) 394; Part VI. *post*.

² *Evans v. Inglehart*, 6 Gill & J. 171; *Hester v. Hester*, 3 Ired. Eq. 9; *Reed's Estate*, 82 Penn. St. 428. Local statutes sometimes provide for a specific distribution of personal property in certain cases. *Rose v. O'Brien*, 50 Me. 188. If shares of specific property are not exactly equal, the balances may be made up in money. *Williams v. Holmes*, 9 Md. 281.

³ If, on final settlement of the administrator's accounts, the assets are partly gold and partly currency, each distributee should have his fair share of each

kind. *Lowry v. Newsom*, 51 Ala. 570. See *Tilsen v. Haine*, 27 La. Ann. 228. And, in general, distributees should be equally dealt with. *Lowry v. Newsom*, 51 Ala. 570.

At the expiration of a specified time, the distributee may bring an action for his share against the administrator under the local act. 10 B. Mon. 62. But *cf.* *Thornton v. Glover*, 25 Miss. 132. Distributees are thus entitled to distribution upon tendering a refunding bond. 24 Miss. 150. As a general rule, a distributee has the right to compel a distribution at any time after the lapse of the period limited for presenting and suing upon claims; but the rights of creditors should be protected according to the exigency. 33 Miss. 134. An administrator should not distribute, nor suffer a decree of distribution to be entered, regardless of claims of creditors brought to his notice which might reduce the surplus. *Clayton v. Wardwell*, 2 Bradf. 1. If residuary parties are willing to

§ 507. **Death of Distributee pending Distribution.** — Descent is cast, and rights of distribution are vested, upon the death of the intestate ancestor or person whose estate is to be administered.¹

§ 508. **Distribution; Reimbursement, Contribution, etc.** — A refunding bond should be taken by the administrator, for his

take their share in personal assets, the representative should not convert into cash. 82 Penn. St. 428.

Distributees have, of course, no right to sue for and recover claims due their intestate's estate pending a settlement, for this is a fundamental right of the administrator. *Kaminer v. Hope*, 9 S. C. 253. And until distribution of an estate is made, the legal title to the assets remains in the representative, irrespective of a distributee's debts, no matter where the possession may be. Hence, shares of the distributees cannot be reached by garnishment pending the administration. *Selman v. Milliken*, 28 Ga. 366. But, after lapse of the time for presenting claims and a final settlement by the administrator, including the payment of debts, and distribution, the property divided among the distributees, or held by them in common, may become liable for their respective debts, or be made available for their own benefit. As to their rights, after a final settlement by the administrator, to sue upon an uncollected *chose*, see *Humphreys v. Keith*, 11 Kan. 108; *Pratt v. Pratt*, 22 Minn. 148. And as to liability of the property correspondingly for their debts, see *Brashear v. Williams*, 10 Ala. 630. See also, as to the effect of a *bond fide* payment made to the next of kin before administration, *Johnson v. Longmire*, 39 Ala. 143; § 120. In fact, the legal title to the personal property of a decedent vests in the administrator specially, and for the special purposes of collecting and preserving the assets, paying the debts, and distributing the surplus. As to the legal title of distributees, where there is no

administration, and no necessity for one, see *Andrews v. Brumfield*, 32 Miss. 107.

After an estate has been distributed, the distributees cannot treat the settlement as illegal or void, on account of an irregularity in the proceedings, without restoring, or offering to restore, what they have received under the settlement. *McLeod v. Johnson*, 28 Miss. 374.

¹ If, therefore, the surviving widow of an intestate dies before the personal estate has been distributed, her share or surplus will devolve upon her own personal representatives. *Wms. Exrs.* 1526; *Carth.* 51, 52; *McConico v. Cannon*, 25 Ala. 462; *Foster v. Fifield*, 20 Pick. 67; *Moore v. Gordon*, 24 Iowa, 158; *Kingsbury v. Scovill*, 26 Conn. 349; *Puckett v. James*, 2 Humph. 565. Cf. *Maxwell v. Craft*, 32 Miss. 307. And so correspondingly with a surviving husband or one next of kin to a deceased person entitled in like manner. As to the husband's death, pending settlement of his wife's estate, a circuitous course was formerly taken in English practice. See *Schoul. Hus. & Wife*, § 415; *Roosevelt v. Ellithorp*, 10 Paige, 415; *Fielder v. Hanger*, 3 Hapg. Ec. 770.

Where any of the distributees of the estate have died, their legal representatives should be brought in before a final settlement of the estate is allowed in court. *Hall v. Andrews*, 17 Ala. 40. The case resembles that of a residuary legatee who dies before his surplus is ascertained; the distributees of an intestate estate being, as it were, residuary legatees under a will drawn up by the legislature for general emergencies. See *Cooper v. Cooper*, L. R. 7 H. L. 53.

own protection, from each distributee, wherever he makes voluntary distribution, before creditor's claims are barred, since otherwise he cannot require contribution if compelled to pay such claims, according to the rule of some States;¹ a rule announced, however, not without admitted exceptions.² Where the administrator has sufficient funds for his own reimbursement, he cannot recover for making an excessive payment to a distributee; and his negligence or default may debar him in other cases from procuring reimbursement; though creditors might, on their own behalf, if not themselves at fault, pursue assets into the hands of the distributees.³

¹ Moore v. Lesueur, 33 Ala. 237; Musser v. Oliver, 21 Penn. St. 362; *supra*, § 506.

² Alexander v. Fisher, 18 Ala. 374; 11 Ala. 264. Such refunding bonds are usually taken with reference to claims of creditors, and not by implication, so as to recover for an excess paid by way of distribution. State v. McAleer, 5 Ired. L. 632; Robinson v. Chairman, 8 Humph. 374.

³ Singleton v. Moore, Rice (S. C.) Ch. 110; Saeger v. Wilson, 4 Watts & S. 501; Donnell v. Cooke, 63 N. C. 227; Wms. Exrs. 883, 1450, 1452, and Perkins's note. And see *supra* as to pay-

ments by executors (§ 491), which indicates that the equity rule is more liberal than that of the common law in such cases.

As to permitting an executor or administrator to set off a debt due to his decedent against the legacy or distributive share payable, see Courtenay v. Williams, 3 Hare, 539; Hodgson v. Fox, L. R. 9 Ch. D. 673; 23 W. R. 826; 28 W. R. 914. And see, as to setting off the representative's own advances, Taylor v. Taylor, L. R. 20 Eq. 155; Kelly v. Davis, 37 Miss. 76. See, further, 37 Ala. 74; 2 Sneed. 200.

PART VI.

GENERAL POWERS, DUTIES, AND LIABILITIES OF EXECUTORS AND ADMINISTRATORS AS TO REAL ESTATE.

CHAPTER I.

REPRESENTATIVE'S TITLE AND AUTHORITY IN GENERAL.

§ 509. **No Inherent Authority or Title as to Decedent's Real Estate.** — As we have already seen, the real estate of a decedent descends at once to his heirs or devisees, and the personal representative has no inherent authority or title thereto under his appointment.¹ An administrator, more especially, takes neither estate, title, nor interest in the realty of his intestate.² Nor has an executor authority over real estate, unless the testator expressly confers such power by his will;³ and, even though thus empowered, whether to sell or dispose of the decedent's land, or to lease it, or to mortgage it, or to invest, re-invest, or change investments of real estate, such power is confined to the methods and purposes therein expressed.⁴

Accordingly, an executor or administrator has no inherent authority to make leases of the real estate belonging to his

¹ *Supra*, § 212, and cases cited; *Wms. Exrs.* 650. As to what is real estate, and not personalty, in the case of manure, hop-poles, etc., see *Fay v. Muzzey*, 13 Gray, 53; *Bishop v. Bishop*, 11 N. Y. 123.

² U. S. Dig. 1st series, Executors and Administrators, 1278; *Drinkwater v. Drinkwater*, 4 Mass. 354; *Stearns v. Stearns*, 1 Pick. 157; *Walbridge v. Day*, 31 Ill. 379; *Vance v. Fisher*, 10 Humph. 211; *Gregg v. Currier*, 36 N. H. 200. An administrator has nothing to do with real estate, or title thereto of

the deceased, save for the benefit of creditors and payment of debts. *Gladson v. Whitney*, 9 Iowa, 267; *Crocker v. Smith*, 32 Me. 244; *Spears Eq.* 399.

³ *Wms. Exrs.* 650; *Gregg v. Currier*, 36 N. H. 200. And see *Place, Re*, 1 Redf. 276.

⁴ 1 Sugd. Powers, 128 *et seq.*, 6th ed.; *James v. Beesly*, 4 Redf. (N. Y.) 236; *Wms. Exrs.* 650, 654, 944, 951, notes by Perkins; *Hauck v. Stauffer*, 28 Penn. St. 235; *Thompson v. Schenck*, 16 Ind. 194; *Brown v. Kelsey*, 2 Cush. 243; *Hawley v. James*, 16 Wend. 61.

decedent's estate.¹ Nor to grant an easement or right of way therein.² Nor to bring ejectment,³ or sue for trespass,⁴ where the right originates after the decedent's death. His conveyance, invalid for want of power in him to make it, appears to leave the title in the heirs or devisees,⁵ and he cannot be charged with its value officially as assets of the estate.⁶ He cannot recover possession of the decedent's land by a suit at law.⁷ Nor are the proceeds of a sale of such land, made by order of a court having no competent jurisdiction, assets in his hands.⁸ Nor should he apply personal assets to repairs and improvements of the decedent's real estate, even though his decedent had agreed to make them.⁹ Nor should he make outlay to strengthen the title.¹⁰ Nor can he mortgage the decedent's lands.¹¹

Even admitting that the personal representative may institute proceedings for setting aside a conveyance of land, which the decedent made in fraud of his creditors, this is for the benefit of creditors only; as for heirs, they must institute proceedings in their own interest.¹²

§ 510. Rule where Representative collects Rents, manages, etc. — If the representative takes possession of the decedent's

¹ Taylor Landl. & Ten. § 133; Bac. Abr. Leases. I. 7; 2 W. Bl. 692; Bank v. Dudley, 2 Pet. 492; 4 Bush, 27; Lee v. Lee, 74 N. C. 70. Otherwise, however, as to dealing with leases granted to his decedent, which are chattels real. *Supra*, § 353. But such lease by an executor or administrator, though good at law, is voidable in equity, unless shown to be in the course of administration, and hence the concurrence of legatees or distributees may often be desirable. Statutes sometimes define the right. See Taylor Landl. & Ten. 134; 3 East, 120; 8 Sim. 217.

² Hankins v. Kimball, 57 Ind. 42.

³ Wms. Exrs. 632, 792; 2 Root, 438.

⁴ Aubuchon v. Lory, 23 Mo. 99.

⁵ King v. Whiton, 15 Wis. 684; Hankins v. Kimball, 57 Ind. 42; Thompson v. Gaillard, 3 Rich, 418; Fay v. Fay, 1 Cush. 105.

⁶ But, as to holding the representative and his sureties liable for misappropriation in case he assumes control, see Dix v. Morris, 66 Mo. 514.

⁷ Drinkwater v. Drinkwater, 4 Mass. 354.

⁸ Pettit v. Pettit, 32 Ala. 288.

⁹ Cobb v. Muzzey, 13 Gray, 57. See 1 Bailey Ch. 23; 2 Hill Ch. 215.

¹⁰ Brackett v. Tillotson, 4 N. H. 208. Where the administrator is guardian of the heir, his management of real estate is on the guardianship account. Foteaux v. Lepage, 6 Iowa, 123.

¹¹ Black v. Dressell, 20 Kan. 153. Nor rescind executory contract for purchase of land. Cotham v. Britt, 10 Heisk. 469.

¹² Richards v. Sweetland, 6 Cush. 324, *per* Metcalf, J. See also Sherman v. Dodge, 28 Vt. 26; Ford v. Exempt Fire Co., 50 Cal. 299.

real estate, and collects rents, he is generally understood to hold the money in trust for the devisees or heirs; and to such parties he should account justly for his management, according to their respective interests.¹ Authority may be conferred and revoked by heirs or devisees for this purpose,² and the representative who collects without their authority is liable to them.³ Under the authority conferred by a will, again, the executor may, of course, manage his testator's real estate; and, if the will orders a special disposition of rents, issues, and profits, he should comply with its directions.⁴ In some American States, as we have seen, liberal provision is made for the management of a decedent's real estate by his personal representative, during the settlement of the estate;⁵ which course may often be convenient, even though the personal assets be ample for the claims presented.

But the representative, in order to justify himself in thus managing the decedent's real estate, should bring himself within the provisions of the statute, or the terms of the will under which he acts, or show consent of the parties interested; which consent may be presumed from their conduct.⁶

§ 511. **Sale of Real Estate to pay Debts, Legacies, etc.** — In the English practice, a power to sell lands, given to the executor under a will, is fully sustained. And, notwithstanding doubts formerly entertained, the English chancery has gone so far, in cases decided during the latter half of

¹ *Supra*, § 213, and cases cited; Taylor Landl. & Ten. § 390; Palmer v. Palmer, 13 Gray, 328; Kimball v. Sumner, 62 Me. 309. Such matters, including taxes assessed on the land since the owner's death, insurance, repairs, and improvements, do not belong properly to the accounts of administration. Lucy v. Lucy, 55 N. H. 9; Kimball v. Sumner, 62 Me. 305.

² *Supra*, § 212; Griswold v. Chandler, 5 N. H. 492.

³ Even though he uses the money as assets to pay debts of the estate. Conger v. Atwood, 28 Ohio St. 134.

⁴ Jones's Appeal, 3 Grant, 250.

⁵ U. S. Digest, 1st series, Executors and Administrators, 1272, 1278; 15 Cal. 259; Kline v. Moulton, 11 Mich. 370; *supra*, § 213; Flood v. Pilgrim, 32 Wis. 377. And as to working plantations, in various Southern States there is similar legislation. 40 Miss. 711, 760; Henderson v. Simmons, 33 Ala. 291; 51 Ga. 647; Johnson v. Parnell, 60 Ga. 661.

⁶ Billingslea v. Young, 33 Miss. 95. Special exception is sometimes made in favor of the representative's authority, where there is no heir or devisee present to take possession. Hendrix v. Hendrix, 65 Ind. 329.

this century, as to imply a power of sale in executors from a charge of debts, although the estate was devised to others.¹ That rule is made clear by statute 22 & 23 Vict. c. 35. But, so far is this from being regarded as an inherent right in the representative, that an administrator is recently held to have no such power to sell a decedent's real estate for payment of debts, either under the general doctrines of chancery or under the statute.² Modern English legislation, nevertheless, renders the lands of a deceased person, not charged with his debts, liable as assets for payment of the same, under the administration of courts of equity; not by way of specifically charging the real assets, but so as to make the heirs or devisees personally liable to the extent of their respective interests.³

In this country, the sale of lands to pay debts of the decedent whose personalty is found deficient, is regulated quite extensively by statutes, in the nature of a probate license to sell.⁴ With the real estate, or its title, it is admitted that the personal representative has nothing to do, by virtue of his office, unless the personal assets prove insufficient for the purposes of his trust; except under the special qualifications already set forth.⁵

Sales of land, in conformity with a will, in order to provide legacies, are, however, permitted both in English and American chancery; the presumption being that a testator intends the legacies given by his will to be a charge on his residuary real as well as his personal estate.⁶

¹ Robinson *v.* Lowater, 5 De G. M. & G. 272; 21 Beav. 337; 37 Beav. 553. In Sugden Powers, 14th Eng. ed. 662, note, this new rule is regarded unfavorably by the author as introducing considerable difficulty in titles. And see Lewin Trusts, 340.

² Clay, *Re*, 29 W. R. 5. Not even an administrator with will annexed has this power. *Ib.*

³ See statutes 1 Wm. IV. c. 47, and 3 & 4 Wm. IV. c. 104, cited Wms. Exrs. 1688-1692; 1 Mac. & G. 456; 22 Beav. 21; Richardson *v.* Horton, 7 Beav. 112.

And see Wms. Exrs. 1688-1692, as to the proper procedure in equity under this act.

⁴ See next chapter.

⁵ See *supra*, § 213; 5 Whart. 228, 350.

The general principle is, that chancery has no inherent jurisdiction in such matters, except for enforcing some specific lien or right in the land. Wms. Exrs. 650; *supra*, § 212, and cases cited.

⁶ Redf. Wills, 2d ed. 207-212, and cases cited; Greville *v.* Browne, 7 H. L.

§ 512. **Exoneration of Real Estate by the Personal; and Marshalling Assets.** — The exoneration of real estate by the personal is an important doctrine of equity jurisprudence in administering estates; the rule being in full conformity with our general policy, that wherever the intention of a testator does not clearly conflict with such an interpretation, real estate shall be applied to debts, legacies, and charges, only so far as personal assets, the primary fund, prove insufficient, notwithstanding mere directions in the will to sell or mortgage for such purposes.¹ Marshalling the assets in favor of creditors and legatees, is the chancery method of causing the whole property, real and personal, of a decedent, to be so applied among claimants, that all equities shall be preserved according to due order.²

Cas. 689; *Bench v. Biles*, 4 Madd. 187; *Poulson v. Johnson*, 2 Stew. 529; *Corwine v. Corwine*, 24 N. J. Eq. 579; 31 N. J. Eq. 427. See Mass. Gen. Stats. c. 102, § 19; *Gibbens v. Curtis*, 8 Gray, 392.

¹ *Walker v. Hardwicke*, 1 My. & K. 396; 1 Sim. 84; *Van Vechten v. Keator*, 63 N. Y. 52; Wms. Exrs. 1705. As this rule, after all, is subject to proper expressions of testamentary intention, numerous subtle refinements are found in the decisions which interpret this intention. See Wms. Exrs. 1694-1712, and Perkins's notes, where this question is examined at length.

American cases admit the general maxims of exoneration; and hence the rule, supported by numerous American, as well as English, equity decisions, that debts contracted by a testator, although secured by mortgage, are to be paid presumably out of his personal property to the exoneration of his real estate. *Supra*, § 430; *Sutherland v. Harrison*, 86 Ill. 363; *Plimpton v. Fuller*, 11 Allen, 140; *Towle v. Swasey*, 106 Mass. 100; *McLenahan v. McLenahan*, 3 C. E. Green, 101; 2 Salk. 449; *Howel v. Price*, 1 P. Wms. 292; Wms. Exrs. 1694-1697, and cases cited. But this is an equitable doctrine with many reservations, and the late English stats. 17 & 18 Vict. c. 113, and 30 & 31

Vict. c. 69, pronounce against such a rule of interpretation. The New York statutes likewise discountenance such presumptions; and, in that State, a mortgage debt is primarily charged upon the real estate mortgaged, unless a will clearly directs otherwise; which seems the fairer doctrine on this subject. *Waldron v. Waldron*, 4 Bradf. Sur. 114; *Van Vechten v. Keator*, 63 N. Y. 52.

² See Wms. Exrs. 1713-1720, and numerous cases cited; 1 Story Eq. Jur. § 558 *et seq.* In the United States, generally, by statute, all the property of the deceased, real and personal, is, in equity, to be applied as follows, when no statute or express will prescribes a different order of application, exhausting all the assets of each class before proceeding to the next: (1) The general personal estate. (2) Real estate specially devised for the payment of debts. (3) Real estate descended. (4) Real estate devised, though charged. 4 Kent Com. 421. And see *supra*, § 490; 2 Jarm. Wills, 588-590; Wms. Exrs. 1693, Perkins's note; *Perry Trusts*, § 566. While creditors are not confined to this general order, legal representatives, heirs, legatees, and devisees have rights for relief against each other in case the true order is disarranged. *Perry Trusts*, § 566.

CHAPTER II.

STATUTE SALES OR MORTGAGES UNDER JUDICIAL LICENSE.

§ 513. **Modern Legislation permitting Sales under a Judicial License.**—In the United States are various modern enactments, of strictly local application, by virtue of which executors and administrators, like other fiduciaries, may be judicially licensed to sell real estate in special cases, where the welfare of interested parties require it, and they have no adequate authority otherwise. In the present instance the usual object of a license is, in the course of administration, to pay debts and legacies, where the personal estate of the deceased person proves insufficient for such purposes.¹ In American practice the probate court is usually invested with an appropriate statute jurisdiction; for such relief the executor or administrator presents his petition for a license, representing the facts essential to the case; and the license being granted, its terms must be carefully pursued. In the execution of a statute power like this, the terms of the legislative grant, with its limitations, should, like the power conferred by a testator under his will, be carefully observed by the court which issues the license, and by the representative who sells under it.²

§ 514. **License restricted to such Land as may be needful; Rights of Heirs and Devisees respected; Qualifications of Rule, etc.**—A license to sell land, for the payment of debts and legacies, is usually restricted to the actual necessities of the

¹ Recent statutes, however, authorize sales and mortgages by license of a court for other purposes, as, for instance, to discharge contingent interests in an estate. See Mass. Pub. Stats. c. 142. Or to sell or release a cemetery lot. Ib. Or where the power under a will was dependent upon the consent of a person since deceased. Ib. Or, under certain circumstances, where there are no known heirs. Mass. Pub. Stats. c. 131, § 11. As to sales by foreign representatives, see Mass. Pub. Stats. c. 134, § 16.

² Mass. Pub. Stats. c. 134.

estate upon the exhaustion of personal assets ; though such statutes provide that, where, by a partial sale of land, the residue or some specific part would be greatly injured, the court may license a sale of all or of such part as may appear to be most for the interest of all concerned.¹ Nor are the rights of heirs and devisees to be ignored ; but they should have due notice of the petition, and opportunity to avert the necessity of a sale ; as, perhaps, by making up the deficiency themselves. . But, by our legislative policy, real estate descends to heirs, or goes to devisees, subject to administration and the due settlement of debts and legacies, and this liability continues against not only such parties, but purchasers from them, until the administration is closed ;² and where there exist lawful claims and insufficient personal assets to meet them, it is the duty of the representative to apply for a license, and of the court to grant it.

§ 515. **Legislative Provisions as to Sale ; Essentials of a Purchaser's Title.** — The local statutes provide in detail the method of procuring a license to sell, and of acting under it.³ Any surplus proceeds which may remain, after satisfying the purposes of the sale, belong to the heirs or devisees, as though impressed with the original character of the property.³ As to the essentials of a purchaser's title, the terms of the statute must furnish the guide ; and while merely incidental irregularities may be cured by the completion or confirmation of the sale, there must have been jurisdiction in the court, and a substantial compliance with the fundamental require-

¹ Mass. Pub. Stats. c. 134.

² State v. Probate Court, 25 Minn. 22.

³ American statutes have usually the following points in common: (1) an application to the court, upon which the license is granted; (2) a special bond covering such proceeds of the sale as may be realized; (3) the formal sale of the land, usually at public auction; (4) the execution of a deed with proper recitals to the purchasers, covenanting that the representative's sale has been legal and upon due authority; (5) a

proper application of the proceeds arising from the sale. As to warranty, the *bond fides* of a sale, the right of a representative to purchase, etc., the maxims set forth, *supra*, § 361, as to sales of personal property, have here a corresponding application. See U. S. Dig. 1st series, Executors and Administrators, 1409-1652; local codes and decisions; 2 Sugd. Vend. & P. 8th Am. ed. 714, note ; Wms. Exrs. 650, and Perkins's notes.

ments of the statute, both in granting the license and in pursuing it.¹ The representative warrants nothing in the title of the land; nor is it for him to remove incumbrances.²

§ 516. **Judicial License to Mortgage Real Estate for Certain Purposes.**—In connection with the payment of debts, legacies, and charges, or for other stated purposes, a personal representative may, as some American statutes provide, be licensed to mortgage real estate of his decedent.³

§ 517. **Levy of Execution obtained against the Representative.**—In some States, lands may be subjected to the payment of claims against the estate, by levying thereon an execution obtained against the personal representative.⁴

¹ Local decisions in construction of local statutes will afford to the practitioner the true rules of guidance. The main question is one of statute interpretation: as to what provisions in fact shall be regarded as imperative, and what as merely directory. The disposition is to regard an infirm sale as voidable at the election of those injured by it, rather than to pronounce it utterly null and void, where there was jurisdiction and all statute provisions plainly imperative were followed.

² *Supra*, § 212; *Le Moyne v. Quimby*, 70 Ill. 399; *Ives v. Ashley*, 97 Mass. 198; 2 Sugd. V. & P. 687, note.

³ Mass. Pub. Stats. c. 134, §§ 19, 20. These statutes are quite strict in expression, and rarely apply in favor of a general administrator; the license to sell enabling him sufficiently to discharge his official functions.

⁴ 4 Allen, 417; 5 Watts, 367; 14 Me. 320. But this course is not universally permitted in this country. See 16 Ill. 318; Wms. Exrs. 651, Perkins's note.

PART VII.

ACCOUNTING AND ALLOWANCES.

CHAPTER I.

ACCOUNTS OF EXECUTORS AND ADMINISTRATORS.

§ 518. **Obligation to keep Accounts; Equitable Jurisdiction in England.** — An executor or administrator is bound to keep clear, distinct, and accurate accounts of his management of the estate committed to him, like any trustee, which accounts ought in some way to be open to the inspection of persons interested in the estate.¹ Upon the analogies of trusteeship, English courts of equity long exercised a jurisdiction over such matters, while the powers of spiritual tribunals appeared inadequate either for compelling the personal representative to administer the estate or to disclose the course of his dealings with it. Among the various functions of chancery, therefore, has been that of entertaining a bill of discovery against the personal representative, and forcing him to set forth an account of the assets and the manner in which he has applied them.² Upon the admitted justice and policy of such coercion, and the confessed inadequacy of all other tribunals to apply it, the lord chancellors firmly rested their authority. Nor did they defer to the ordinary himself in these proceedings; for a bill might be brought in chancery, for the discovery of assets, before a will had been proved in the spiritual courts, and, indeed, while probate litigation was pending; they did not deem it needful to wait until an executor had received his letters testamentary, provided a trust

¹ *Freeman v. Fairlee*, 3 Mer. 43; *Perry Trusts*, § 821; *Rhett v. Mason*, 18 Gratt. 541. ² *Howard v. Howard*, 1 Vern. 134; *Brooks v. Oliver*, Amb. 406; *Wms. Exrs.* 2005, 2006; *Story Eq. Jur.* § 534.

of some sort could be alleged and proved against him; and even though an administrator's accounts had been passed and distribution ordered in the ecclesiastical forum, chancery might at discretion re-investigate and direct an accounting *de novo*.¹

§ 519. **The same Subject; Creditors' Bills, etc.; English Practice.**—Proceedings of this character were usually brought by what was known as a creditors' bill. One or more creditors of the estate would file a bill in chancery on behalf of themselves and all others who might be brought in under the decree, with the intent of preventing any undue preferences by the executor or administrator in the payment of claims, and causing all the assets to be brought in and appropriated in a due course of settlement.² If assets were admitted by the representative, and the petitioner's debt proved, immediate payment therefor was ordered;³ otherwise, a general account of the estate, and all debts and claims upon it, was taken against the executor or administrator, and an appropriation of the fund directed accordingly.⁴ As one creditor might thus institute proceedings which would bring in all the other creditors besides, so one or more legatees or distributees might, on behalf of themselves and all others similarly concerned, invoke the aid of chancery with corresponding effect.⁵ And yet, complicated and costly as might be the process for working out such results, none were conclusively bound by the final decree, who had not been brought within the scope of the suit; and absent creditors, legatees, or distributees, who had been guilty of no laches in failing to respond and becoming parties to the bill in equity, might afterwards assert their claims, not, indeed, against the executor or administrator himself, but for contribution from the creditors, legatees, or distributees, who

¹ 2 Vern. 47, 49; Phipps v. Steward, 1 Atk. 285; 2 Chanc. Cas. 198. Some wilful neglect or default with respect of assets was usually, however, to be alleged and shown, as the ground of invoking chancery remedies in cases of this kind. Wms. Exrs. 2006, note; Coope v. Carter, 2 De G. M. & G. 292.
² See *supra*, § 437.
³ Woodgate v. Field, 2 Hare, 211.
⁴ Wms. Exrs. 2007; 1 Russ. & My. 347.
⁵ *Ib.*

had obtained at much cost what they had supposed their own.¹

The natural tendency of all this must have been, to make practical waste of the assets, while theoretically assuming to save them; to bury the better part of an estate in a wholesale litigation, lest one should be preferred. Under English enactments during the reign of Victoria, some of the most serious objections to these prolix and costly proceedings have been removed; the creditor, legatee, or distributee who petitions, has now become, in a measure, the master of his own suit, pending a decree, and need not serve the others in interest; chancery exercises authority with apter discretion; and a suit may more readily terminate, as such suits often do, in the settlement or compromise of the petitioner's individual demand, the proceedings for administration and a full account in chancery being consequently dropped.² Nevertheless, the English equity courts are still much exercised with creditors' bills and suits for administration;³ and, as incidental thereto, the taxation of costs⁴ appears to be an

¹ *David v. Frowd*, 1 My. & K. 200; Wms. Exrs. 1450, 2008. Members of a class only contingently entitled to a benefit under the will cannot maintain an administration suit. *Clowes v. Hilliard*, 25 W. R. 224.

² Stats. 15 & 16 Vict. c. 86; 22 & 23 Vict. c. 35; 2 Hare, 213; Wms. Exrs. 2008, *et seq.* See also equitable remedies, *post.* And see *Nayler v. Blount*, 27 W. R. 865; *Laming v. Gee*, 27 W. R. 227; *Wollaston v. Wollaston*, L. R. 7 Ch. D. 58.

³ In Wms. Exrs. 2008, *et seq.*, the subject will be found discussed at length, with numerous citations. Where an account of assets is thus sued for, the personal representative of a former representative of the estate is properly joined as a co-defendant with the representative then in office. Wms. Exrs. 2014; *Holland v. Prior*, 1 My. & K. 237. And as to co-executors, see L. R. 10 Ch. 464. The suit may be brought still on behalf of other creditors, etc.

Eyre v. Cox, 24 W. R. 317. And, under some circumstances, must be. 24 W. R. 269.

⁴ See, *e.g.*, among very recently reported English cases, involving questions of costs, etc., L. R. 10 Ch. D. 468; L. R. 7 Ch. D. 33, 176; 26 W. R. 165; 29 W. R. 420, 821; *Moore v. Dixon*, L. R. 15 Ch. D. 566. And as to awarding costs where executors had distributed to wrong parties and returned incorrect accounts, etc., see 25 W. R. 161; also 24 W. R. 51, as to his error or wilful mistake. Where it is probable that the estate will prove insolvent, the judgment in a creditor's action should contain provision for that emergency. 44 L. T. 547. Costs of an administration suit are sometimes payable out of a particular fund designated by the will. 44 L. T. 499; *Sharp v. Lush*, L. R. 10 Ch. D. 40, 468; *Penny v. Penny*, L. R. 11 Ch. D. 440. Interrogatories may be put to the defendant executor as to the accounts. 44 L. T. 547.

absorbing cause of dispute. And, after all, though one may get his debt or legacy paid, he cannot readily obtain an inspection of the administration accounts.

§ 520. **The same Subject; Creditors' Bills, etc., in American Practice.**— In various instances, few of which are very recent, the equity courts of American States have entertained bills filed by creditors and others in interest, who seek an accounting from the executor or administrator, in connection with the enforcement of their individual rights in the disbursement or distribution of the assets. And, wherever the probate and common-law courts are found incompetent, in any State, to afford the relief thus sought, a court of equity, as such courts are usually constituted, may, perhaps, compel the executor or administrator to account for, administer, and distribute the property entrusted to them.¹

But, in the United States, modern probate practice, as extended by our local legislation, affords, usually, all the facilities now needful for compelling a duly qualified personal

As to commencing such actions by next friend on behalf of infants interested, see 25 W. R. 873. A receiver may be appointed on motion in creditors' actions. 26 W. R. 434. Official referees are also appointed. See 29 W. R. 821. And see *passim*, Wms. Exrs. 2008, *et seq.*; *supra*, § 437.

¹ Colbert *v.* Daniel, 32 Ala. 314; Cram *v.* Green, 6 Ohio, 429; 2 Hayw. 163; Wright *v.* Lowe, 2 Murph. 354; Rogers *v.* King, 8 Paige, 210. This jurisdiction appears to be reluctantly taken in most States, if taken at all. Thus, an executor, who was also an agent or trustee of the decedent during his life, cannot, after the final settlement of his accounts in the orphans' court, be called upon to account separately as a trustee in equity. Vanmeter *v.* Jones, 3 N. J. Eq. 520. An executor *pro forma* need only account for the surplus remaining after paying debts. 2 Har. & J. 191. Order for an account has, in some cases, been declined after a long

interval. 8 Ired. Eq. 141. Or where it was not alleged that insufficient security had been given by the representative. 2 P. & H. 225. In Morgan *v.* Rotch, 97 Mass. 396, it is held that a suit in equity, charging the executor with conduct in violation of his trust, is not sustainable where he has not yet rendered a final account in the probate court. And see Garrett *v.* Stilwell, 10 N. J. Eq. 313. Stale demands are not to be reopened. 35 Ark. 137. But a bill filed by one who was no party to a final settlement in the probate court may treat it as null, and invoke a court of equity to compel a full account. 5 Cal. 58. Legatees and next of kin should not be joined as parties. 53 Md. 550. And a creditor cannot bring a bill to have an account taken for his own benefit, apart from other creditors. 2 N. J. Eq. 133. See 5 Rand, 195; 3 Sm. & M. 329; 1 Sandf. Ch. 399; 3 Johns Ch. 578; Garvin *v.* Stewart, 59 Ill. 229.

representative to account for his management of the estate confided to him; and that by a process comparatively inexpensive and simple, founded upon the duty he owes under his bond. As we shall presently show, in detail, the probate court which controls the appointment and removal in the first instance, has become, in most of the United States, the competent and convenient primary forum for his accounting; an appeal, of course, lying to the supreme probate and equity tribunal of the State, as from other probate decrees. The American rule of the present day is, therefore, with few exceptions, that the court of chancery, usually, has neither jurisdiction nor occasion to interfere in the settlement of the estate, and to order an accounting by an executor or administrator.¹ And, even as to one who has resigned or been discharged from his trust, our law inclines to treat him as one whose accounts should be closed under probate direction, as in the case of one who has died in office.²

In a few American States, however, where chancery jurisdiction is plenary, equity and probate courts appear to exercise a sort of concurrent jurisdiction as to the accounts of executors and administrators.³ And where it becomes necessary to apply to a court of equity, as, for instance, should the personal representative himself ask for necessary instructions as to the final distribution under a will, that court, some-

¹ Jones v. Irwin, 23 Miss. 361; Morgan v. Rotch, 97 Mass. 396; Walker v. Cheever, 35 N. H. 345; Adams v. Adams, 22 Vt. 59; Wms. Exrs. 2006, note by Perkins. Cf. 10 N. J. L. 287. Though, as to matters growing out of the account, such as adjusting rights between the representative and the estate, it may be otherwise. Adams v. Adams, *supra*.

In the United States, as well as in England, the common-law courts have no immediate cognizance of the accounts of executors and administrators, and cannot compel a performance of the duty; this being a branch of probate or equity jurisdiction. Wms. Exrs. 786,

1931, Perkins's note; 1 Nott & M. (S. C.) 587.

² Cf. Gould v. Hayes, 19 Ala. 438; 8 Sm. & M. 214; 33 Miss. 560. And see 81 N. Y. 573. See also, as to the bill for an accounting from one's predecessor, Stallworth v. Farnham, 64 Ala. 259, 345. And see, as to administrators *de bonis non*, *supra*, § 408.

³ Ewing v. Moses, 50 Ga. 264; Marsh v. Richardson, 49 Ala. 431; Sanderson v. Sanderson, 17 Fla. 820. As to settling two estates under the same administrator, see 56 Ala. 486. As to appellate powers, or those of review in chancery, where the probate tribunal has acted, see further, *post*.

times — having all parties before it, by means of personal or substituted service — proceeds to the settlement of the representative's accounts and a final distribution.¹ Convenience may sometimes dictate such a course; besides which, the assumption of authority by so august a tribunal may not, in practice, be readily disputed. A court of chancery will rarely interfere, however, where the probate tribunal has already taken cognizance, and is competent to adjust the account.² Provision exists, in some States, for removing the settlement of an estate from the probate to the chancery court, in certain cases.³

§ 521. *Ecclesiastical and Probate Jurisdiction of Accounts in England.* — To come to our main subject, namely, ecclesiastical and probate jurisdiction over the accounting of executors and administrators. We have seen, that, as to security from executors, neither the spiritual nor the probate court has, in England, been vested with competent powers; but, that courts of chancery rather have exercised whatever plenary authority was available;⁴ also, that administrator's bonds,

¹ *Daboll v. Field*, 9 R. I. 266; *Wms. Exrs.* 2006, and note. The Mississippi code aims, in regulating such suits, to allow, in a single suit, complete justice to be done to all parties, including creditors, distributees, and sureties. *Buie v. Pollock*, 55 Miss. 309. And see *Kent v. Cloyd*, 30 Gratt. 555.

The original and inherent jurisdiction of equity, in a State, we may add, over an executor's or administrator's accounts, is not to be taken away by mere implication, whenever a legislature clothes the probate tribunals with competent powers; nor, even at this day, is a local probate authority usually found adequate for adjusting all the questions which may arise in the course of settling estates, still less for exercising exclusive jurisdiction in such matters. And yet the American tendency is, and ought to be, to favor pre-eminently the probate

tribunals as those of primary functions, for dealing with the accounts of executors and administrators, and keeping the records of settlement, and regulating details after its own simple system; while chancery refrains from disturbing these methods, unless a special complication renders its intervention desirable, and, on the whole, discourages costly and burdensome proceedings out of course by creditors' bill or otherwise, to the needless shrinkage of the assets; all parties aggrieved having ample opportunity for redress by taking a direct appeal from the probate decree.

² *Seymour v. Seymour*, 4 Johns. 409.

³ *Marsh v. Richardson*, 49 Ala. 431. That the probate court in this State is a court of general jurisdiction for the settlement of administration accounts, see 65 Ala. 16.

⁴ *Supra*, § 137; *Wms. Exrs.* 237.

under the latest acts, do not enforce the duty of a probate accounting very strenuously.¹

One may readily infer, therefore, that jurisdiction over the accounting of executors and administrators, as exerted by the English probate or ecclesiastical tribunals, is, in character, quite secondary to that of chancery. It is said, that neither an executor or administrator can be cited by a probate tribunal *ex officio* to account after he has exhibited an inventory, but it must be at the instance of an interested party. But those interested, and those with even the appearance of an interest, may, we have seen, require an inventory to be produced.² Whether this should be equally true of proceedings for account or not, it is clear, that, at the instance of a legatee, or next of kin, or creditor, the representative was compelled to account; before the ordinary, while the probate tribunal was an ecclesiastical one. But, while a creditor might, by this course, gain an insight into the condition of the assets, in aid of proceedings in the common-law courts to enforce his rights, the probate tribunals had no authority to award payment of his debt; and hence, the bill in equity, praying for a discovery of assets and administration, was more commonly brought.³ Legatees and distributees were better off; for legacies and distributive shares might formerly be sued for in the ecclesiastical forum; and, indeed, it was by a sort of invasion of the spiritual jurisdiction that English chancery courts first began to take cognizance of such rights; but the exclusiveness of chancery authority in this latter respect, as finally conceded by the English parliament, plainly indicates how inadequate must have been the relief which an ecclesiastical forum in that country was ever competent to afford.⁴

¹ Acts 21 Hen. VIII. c. 5; 22 & 23 Car. II. c. 10; 20 & 21 Vict. c. 77; Wms. Exrs. 529-533; *supra*, § 139.

² Wms. Exrs. 2057; 1 Salk. 315, 316; 3 Atk. 253, by Lord Hardwicke; Wainford v. Barker, 1 Ld. Raym. 232.

³ *Supra*, § 519; Wms. Exrs. 2058, 2061; Toller, 495; Burn Eccl. Law, 487.

⁴ Deeks v. Strutt, 5 T. R. 692. It was Lord Nottingham who first extended the system of equitable relief to legatees. Wms. Exrs. 2061. Under act 20 & 21 Vict. c. 77, § 23, the new court of probate can entertain no suits for legacies nor for the distribution of the residue. *Ib.*

Upon petition for an account before the probate or ecclesiastical forum, the creditors, legatees, and all others having an interest must be cited to be present ; as, otherwise, an account rendered in their absence will not bind them. At the hearing, whether all such parties appear or not, the judge shall proceed, and the account, as determined, shall be final.¹ Inventory and account, in modern English practice, are usually returned at the same time ; for neither inventory nor account is produced unless called for ; and if interested parties seek the one they probably request the other. But if the personal representative exhibits personally his inventory and account, and takes his oath to the truth thereof, he has performed his whole duty by creditors ; for they are not permitted to contest items, but his oath, given under the penalties of perjury, concludes the matter here.² If, however, a citation to account in the ecclesiastical forum was given by a legatee, or next of kin, the account, as rendered, could be objected to or disproved ; and, notwithstanding his general oath, the personal representative might be put to his proof of each item.³ Wherever it appeared, upon due investigation, that the account rendered was true and perfect, however, the court decreed its validity ; and, as to all interested parties cited in, the decree became final, and no further suit could be entertained.⁴

It might happen that, while one creditor resorted thus to the probate tribunal, another would invoke the ampler relief afforded by chancery.⁵ But chancery judges would not permit creditors, legatees, or next of kin to use the process of the spiritual courts in aid of an administration suit ; and wherever one who had brought his bill in chancery prayed for an

¹ 4 Burn Eccl. Law, 487 ; Wms. Exrs. 2058.

² 2 Add. 330 ; 4 Burn Eccl. Law, 488 ; Wms. Exrs. 2060. As to whether objections could be entertained to an inventory, there has been some variance in the decisions. Wms. Exrs. 982, 2060.

³ The rule was that for payments made *bond fide* in sums less than 40s.

the oath of the executor or administrator was admitted as due proof, but for payment of larger sums he had to produce vouchers. 4 Burn Eccl. Law, 488 ; Wms. Exrs. 2060.

⁴ Wms. Exrs. 2060 ; 4 Burn Eccl. Law, 487.

⁵ 2 Cas. temp. Lee, 561.

inventory under a probate citation, he was compelled to make his choice which tribunal to proceed in.¹

As the new English court of probate is invested with the same authority as the spiritual courts formerly exercised in such matters, but under nominal restrictions even greater as to affording practical relief to those entitled to ask for an account, the supremacy of the English chancery, in litigation which relates to the discovery and administration of assets, appears to have become more firmly established than ever.² That returning either inventory or account to a probate tribunal has become a matter of indifference, appears conceded by the very form of the bond now prescribed by the English probate court;³ it is a virtual assent that courts of equity shall direct and supervise the practical administration and settlement of contentious estates, and that non-contentious business may be privately adjusted.

§ 522. **Probate Jurisdiction of Accounts in the United States.**—In this country, where courts of probate are temporal tribunals, and a harmonious judicial system prevails in the several States, the primary and usual forum of accounting is the local probate court, whence the executor or administrator received his credentials. To this tribunal, by the American system, regular accounts should be returned by the personal representative, as well as his inventory. The bond, which neither testacy nor intestacy exempts one from furnishing, obliges the representative to return an account to the probate court, not upon request, but within stated and regular periods, until the administration is closed; and to this condition the sureties of the representative, if there be such, stand likewise bound.⁴ The system of probate accounting is simple, exact, and, except in contentious business, attended with little cost.

¹ 2 Cas. temp. Lee, 31, 134, 268; Wms. Exrs. 2061.

² See stat. 20 & 21 Vict. c. 77; Wms. Exrs. 290, 292, 2062.

³ See *supra*, §§ 137–139; Wms. Exrs. 533. The condition of bond (less strict than that formerly stated) is that the principal shall make and exhibit an in-

ventory and render an account of administration "*whenever required by law so to do.*" *Ib.* We have seen that, even with the old form of bond, the practice of returning an inventory had fallen into disuse in that country. *Supra*, § 229.

⁴ *Supra*, § 140. Such is the usual tenor of legislation in American States.

The probate accounts of each deceased person's estate become matter of public record. And, while the parties interested may, perhaps, be suffered to close up an estate privately, provided those entitled to the surplus all agree, and all creditors' claims and legacies are settled, together with charges, the failure to render one's probate account is, nevertheless, a breach of the bond, and any dissatisfied party in interest may avail himself of it.¹ Under such conditions, it is unlikely that an estate will be settled out of court without affording to all concerned a fair opportunity of inspecting the administration accounts, unless, at all events, their respective claims are fully and promptly settled.

If, in fact, an executor or administrator settles privately with the parties interested, rendering no final account to the probate court, such a settlement, though often perhaps con-

¹ McKim v. Harwood, 129 Mass. 75.

A private arrangement between some of the distributees does not discharge the administrator as against any one who was not a party to the agreement; nor as against a deceased party in interest whose own representative did not enter into it. Smilie v. Siler, 35 Ala. 88. And distributees may generally, at election, hold the administrator to a strict statutory accounting. Stewart v. Stewart, 31 Ala. 207. Even if the assets were all used in preferred charges, one is accountable. Griffin v. Simpson, 11. Ire. 126. Liability to account to legatee not discharged by legatee's written receipt of a nominal sum in full of all demands. Harris v. Ely, 25 N. Y. 138.

Next of kin and residuaries may petition to compel an account. Hobbs v. Craige, 1 Ired. L. 332. So may a creditor or legatee. Harris v. Ely, 25 N. Y. 138; Wever v. Marvin, 14 Barb. 376. But see Freeman v. Rhodes, 3 Sm. & M. 329. Concerning devisees, see 4 Desau. 330. And as to a *cestui que trust* or infant, whose trustee or guardian is one of the executors, see 1 Sandf. Ch. 399. The representative is bound to account upon the application of any

one interested in the estate, and if the applicant has no interest, that is a sufficient defence before the probate tribunal. Becker v. Hager, 8 How. (N. Y.) Pr. 68. But relief by injunction is not to be granted on this ground. *Ib.* See Okeson's Appeal, 2 Grant (Pa.) 303.

Delay in settling accounts is leniently regarded by some American courts where no fraud or misconduct has intervened. Jones v. Williams, 2 Call, 102. But correct accounts should have been kept and exhibited to any interested party desiring to see them. Rhett v. Mason, 18 Gratt. 541. As to the duty of probate accounting, notwithstanding a pending chancery suit, see Jones v. Jones, 41 Md. 354. Breach of the bond, how cured before suit brought on it. McKim v. Harwood, 129 Mass. 75.

A sheriff or *ex officio* administrator may be cited in to account. McLaughlin v. Nelms, 9 Ala. 925. As to accounting by the representative of a deceased representative, see Schenck v. Schenck, 3 N. J. L. (2 Pen.) 562; *supra*, § 408.

See, in general, Sellers v. Sellers, 35 Ala. 235; Hillman v. Stephens, 16 N. Y. 278; Whiteside v. Whiteside, 20 Penn. St. 473.

veniently made, will not absolve him from compliance with the law; and he may be cited into court, and compelled to render account *thère*, even though he produces the receipts of all the surplus distributees, acknowledging the payment of their respective shares in full.¹ A settlement out of court is not presumed to intend dispensing with accounting; and, even if it did, not to account is a breach of the conditions annexed to the appointment. Not only are representatives liable to suit on their official bond if, on being cited in, they neglect to render accounts of administration, but, under some American codes, they may be indicted for delinquency in this respect,² or compelled to pay a fine;³ and one may be removed from his trust for failing to account correctly on citation.⁴ In various States, moreover, the probate court may, of its own motion, and without application of an interested party, make an order citing in the delinquent representative.⁵ And thus American probate practice is seen to be quite different from that which prevails in England.

But an executor or administrator is not bound to render either account or inventory, it is held, where no property has come to his hands.⁶

§ 523. Citation of Parties interested in the Account, in American Probate Practice; their Assent to its Allowance. — In American probate practice, the executor or administrator

¹ *Bard v. Wood*, 3 Met. 74; *Clark v. Clay*, 11 Fost. 393.

² See *State v. Parrish*, 4 Humph. 285; *Davis v. Harper*, 54 Ga. 180; 14 La. Ann. 779. He may be imprisoned for contumacy. 14 La. Ann. 779.

³ *Collins v. Hollier*, 13 La. Ann. 585.

⁴ See, as to removal, *supra*, § 154.

⁵ *Witman's Appeal*, 28 Penn. St. 376; *Campbell, Re*, 12 Wis. 369. But one is not considered as refusing or neglecting to account, within the usual meaning of American statutes, until he has been cited by the probate court for that purpose. *Nelson v. Jaques*, 1 Greenl. 137; *McKim v. Harwood*, 129 Mass. 75; *Barcalow, Matter of*, 29 N. J. Eq. 282. And, upon showing the court

that he has received no assets, he is excused; or, if good cause be furnished for further delay, the court is usually empowered to grant it. Citation to the representative is a matter of right. *Smith v. Black*, 9 Penn. St. 308.

Neglect of the representative to make answer to a demand to pay sums due by way of distribution may be considered a refusal to account. *Cutter v. Currier*, 54 Me. 81.

Where the representative has appeared in answer to a citation, he is affected with knowledge of all subsequent proceedings. *Duffy v. Buchanan*, 8 Ala. 27.

⁶ *Walker v. Hall*, 1 Pick. 20.

presents his account to the register, who issues a citation directing next of kin, creditors, legatees, and all other persons interested in the estate, to appear before the probate court at a day stated, and show cause, if any they have, against its allowance. Citation is usually by newspaper publication, and the representative must obey the mandate as issued to him. But, following the distinctions to be noticed between partial accounts and the final account, those of the former kind are not unfrequently passed upon by the judge without formal citation, the rights of interested parties being more sedulously protected at the final rendering; nor is a probate court always left without some statute discretion as to requiring a citation at all. Citation may be dispensed with when all persons interested (or, more particularly, those entitled to the surplus) express, in writing, their request that the account be allowed without further notice; thereby assenting virtually to its allowance. But the assent of one or more persons in interest does not conclude the others, nor impair their own right to be cited in before the account is allowed.¹

In some States, where one of the persons interested in a final accounting is an infant, or not *sui juris*, a special guardian must be appointed to represent him.² But, in others, a published citation appears to dispense practically with other formalities. The fact, that a probate decree may be voidable as to an infant, does not, of course, entitle any one else

¹ A probate citation is usually published once a week for three successive weeks; the statute requirement should be carefully followed. See 16 Ala. 693. Where notice is given of an annual or partial settlement, a final decree is improper. 21 Ala. 363. See *Scott v. Kennedy*, 12 B. Mon. 510; 20 Miss. 649; Probate Manuals of Smith, Redfield, and Gary, *passim*; also the provisions of local codes. In some States greater formality appears to be pursued. The account must be first presented to the judge, accompanied with vouchers; it must then be examined and stated for allowance; after which notice is given of the term

at which it will be reported for allowance, that all who are interested may examine the account as stated, and be prepared to contest it. See *Robinson v. Steele*, 5 Ala. 473; *Steele v. Morrison*, 4 Dana, 617; 5 Hayw. 261. We have seen that claims upon an estate are in some States regularly filed for allowance in court. *Supra*, § 420. It is customary, however, in New England States, and in many others, for the executor or administrator to pay and keep his own vouchers for payments, presenting such vouchers for the court's inspection upon any controversy.

² *Gunning v. Lockman*, 3 Redf.

who is interested to invoke such disability on his own behalf.¹

§ 524. **The Form of Administration Account.** — In his probate account, it is usual for the executor or administrator, by way of general statement, to charge himself with the amount of assets which have come to his hands, and ask to be allowed for the amount of all debts and claims paid by him, together with the expenses of administration; the balance shown, if any, going over to the next account, or remaining finally for distribution. A convenient form, adopted in various States, makes the general statement on the face of the account refer for details to schedule A. and schedule B.; schedule A. sets forth the items with which the representative charges himself, making the inventory valuation of personal property the first item in a first account, and the balance from the next preceding account the first item in each succeeding account; schedule B. details the payments, the losses upon the inventory valuation, and charges. The usual rules of single-entry bookkeeping are following, as to entering dates, parties, sums received or paid, and the like. In many States, blanks are supplied at the probate registry for the purposes of probate accounts.²

The proper number of each administration account is stated on its face; a final account, moreover, should plainly purport to be such;³ but perhaps an account, appearing on its face to be a final one, will be deemed such, although not so styled in the caption.⁴

§ 525. **Authentication and Proof of Account in American Probate Practice.** — A probate account is usually submitted

¹ Hutton v. Williams, 60 Ala. 107. In some States accessible parties, such as a distributee residing within the county, are entitled to personal service of the notice of final settlement. 34 Miss. 322.

Neglect of legatees, etc., to attend at the final settlement, enables the representative to proceed *ex parte* as to those who fail to appear. 4 Paige, 102.

Notice is not a pre-requisite to probate jurisdiction, and the want of notice may be cured by the voluntary appearance of the parties interested. 35 Ala. 295.

Creditors of distributees are not parties in interest who may object to the representative's account. 40 Ala. 289.

² See Smith Probate Guide, 165.

³ Bennett v. Hannifin, 87 Ill. 31.

⁴ Stevenson v. Phillips, 21 N. J. L. 70.

on oath by the executor or administrator. This oath, to the effect that the account is just and true, is administered in open court by the judge of probate, according to the more exact practice; current legislation, however, tends to facilitate such business, where the judge's duties are onerous, by permitting the oath not only to be taken out of court, but to be administered by any justice of the peace.¹ Whether the oath to the account is administered by the judge or not, his decree of approval is generally essential, before its formal allowance.

Much of this accounting is non-contentious and formal; and with the rendering of his account, thus sworn to, together with an affidavit that the citation to interested parties has been duly served, if citation was ordered, or, instead, their written assent, the duty of the executor or administrator is fulfilled. But the judge of probate may at discretion scrutinize the account, ask proof as to particular items, and ascertain judicially that the account is correct before allowing it.² And if parties interested appear and object to its allowance as presented,³ a fair hearing should be given them. The court may allow, disallow, or order the accountant to charge himself with sums received which should have been entered, and practically require a restatement of the account, with proper corrections, as justice may require; though as to compelling such restatement, independently of a clear statute authority, the power of a probate judge may be questioned.⁴

¹ See *Gardner v. Gardner*, 7 Paige, 112. The accounts of joint executors or administrators may be rendered on the oath of one of them. Mass. Pub. Stats. c. 144.

² Especially if the rights of infants or absentees are concerned. *Gardner v. Gardner*, 7 Paige, 112.

³ The probate court may proceed to determine whether a party who objects to an account has any interest in the estate, notwithstanding such party's sworn statement that he has an interest. *Garwood v. Garwood*, 29 Cal. 514; *Hal-leck's Estate*, 49 Cal. 111. The inter-

est should be alleged of record. 2 Harring. 273.

⁴ The hearing before a judge of probate takes usually the course indicated in the text; the procedure being flexible, and the practical object to secure a correct account and settlement; and the representative himself, as well as the parties in interest, usually acquiescing in the decision of the judge. But it is held that an executor or administrator cannot be compelled to conform his return under oath to the views of the court; that it is for the representative to make returns, and for the court to judge

The executor or administrator, as various local codes declare, may be examined on oath before the court, upon any specific matter relating to his accounts;¹ and the party at whose instance interrogatories have been proposed to him has a right to offer evidence to disprove his answers.² As in the old ecclesiastical practice, the executor or administrator is a competent witness to small charges;³ but larger items objected to he ought to support by vouchers or other extraneous proof.⁴ One money standard, and that the prevalent and legal one, ought to regulate the whole accounting.⁵

Hearings before a judge of probate upon an administration account are generally quite informal; and issues are raised, and questions put and answered, regardless of technical rules, the judge seeking to elicit truth upon a summary hearing, that he may decide correctly and quickly. Oral testimony is generally admitted, and explanations are made by the representative, often without being sworn at all. Where, however, disputants insist upon it, the rules of judicial investigation are more strictly observed; the representative is put upon oath as to items;⁶ and, if chancery precedents be favored, those surcharging an account should specify the particular items objectionable, and issues be framed accordingly.⁷ But an examination is not usually confined to written interrogatories and answers, though it may be thus conducted; and even should the account be regularly audited, strict proof of

of their effect. 40 Miss. 704. But the court may have a correction made by reference or otherwise where the representative does not correct the account. 41 Miss. 411.

¹ Stearns v. Brown, 1 Pick. 530; Hammond v. Hammond, 2 Bland, 306; 44 Mich. 57. And see Ogilvie v. Ogilvie, 1 Bradf. 356. The duly verified administration account is *prima facie* correct. 4 Redf. (N. Y.) 265.

² Higbee v. Bacon, 8 Pick. 484; Wade v. Lobdell, 4 Cush. 510; Smith Prob. Pract. 183.

³ Bailey v. Blanchard, 12 Pick. 166. Charges "not exceeding forty shillings" may be thus proved.

⁴ Hall v. Hall, 1 Mass. 101; 19 Tex. 317; 12 La. Ann. 537; 2 Dev. & B. Eq. 325.

⁵ See 2 Call, 190; Magraw v. McGlyn, 26 Cal. 420. Upon an accounting, payments made cannot be rejected, because neither the accounts nor the oath show to whom the payments were made; but the testimony of the representative is admissible on this point. Nichols, *Re*, 4 Redf. 288.

⁶ Rathbone's Estate, 44 Mich. 57; Stearns v. Brown, 1 Pick. 530.

⁷ See Tanner v. Skinner, 11 Bush, 120. But this rule is flexible as applied. Gardner v. Gardner, 7 Paige, 112; Buchan v. Rintoul, 70 N. Y. 1.

items may be dispensed with where, from the nature of the case, vouchers cannot be produced.¹ In settling an administration account, a probate or equity court is not usually bound by technical rules of evidence.²

§ 526. **Periodical Returns; Partial Accounts and the Final Account.**—Periodical return is part of the American probate system; a first account being ordered within a stated time, usually one year from the date of appointment; and other accounts from time to time, or, perhaps, annually, until the estate is fully settled. Hence, as estates may not always be legally wound up within one year, a practical distinction between partial accounts and the final account which closes the administration.³

¹ *Lidderdale v. Robinson*, 2 Brock. 159. Vouchers alone may not be strictly evidence of payments without authentication, but they are accepted usually if not objected to. 2 Dev. Eq. 137.

² *Sterrett's Appeal*, 2 Pa. 419; *Romig's Appeal*, 84 Penn. St. 235. In some States an account in contentious business is to be made before an auditor under the probate court's direction, and he will report. *Hengst's Appeal*, 23 Penn. St. 413; *Pollock, Re*, 3 Redf. 100; *Rich, Re*, 3 Redf. 177; *Tucker v. Tucker*, 28 N. J. Eq. 223.

When the disputed account of an executor or administrator is referred to an auditor for examination, he should pass upon the objections filed to the accounts and no others; the surrogate or probate judge may allow further objections to be filed; but, if the rulings of an auditor are appealable at all from the surrogate or judge, the questions must at all events have been first referred to the surrogate or judge for his decision. *Boughton v. Flint*, 74 N. Y. 476. The probate court need not refer matters to an auditor where the facts can be conveniently ascertained and determined without doing so. *Maxwell v. McClintock*, 10 Penn. St. 237. And

see, as to auditor, 15 Penn. St. 403; 23 Penn. St. 180.

On an accounting, the executor or administrator may be required to disclose the assets of a partnership of which he and the decedent were members when the latter died, although the interest of the decedent in the firm is entirely unliquidated. *Woodruff v. Woodruff*, 17 Abb. (N. Y.) Pr. 165.

Upon the final accounting, the probate judge or surrogate has generally a jurisdiction to hear and determine a disputed claim of the executor or administrator himself against the estate; and even though the claim were such that equitable relief for enforcing it could only be had in chancery, the right to retain out of the assets of the estate a sum of money as belonging or due to him, brings the matter fairly within the province of the tribunal which passes upon the account. *Boughton v. Flint*, 74 N. Y. 476; *Kyle v. Kyle*, 67 N. Y. 400. See, as to retainer, *supra*, § 439.

³ As to requiring annual returns, see *Wellborn v. Rogers*, 24 Ga. 558. The periods for settling accounts are prescribed in each State by statute, and accounts are usually to be rendered within a year from the time of appoint-

The rule is, that partial accounts of administration are, especially if rendered without citation, only *prima facie* correct, and bind no one in interest; and, on a final settlement, they may be so far opened up, without any special application, as to correct errors therein, whether originating in fraud or misapprehension, and although the error was not excepted to when the partial account was rendered, nor then appealed from.¹ Former accounts, too, may be opened up for correction of fraud or mistake, upon the filing of subsequent partial accounts, as various local acts plainly sanction.² A final account has the force of a final judgment, and is taken to be conclusive, unless appealed from or impeached for fraud; while a partial account is only a judgment *de bene esse*; according to such practice, is often rendered *ex parte*, and without notice to persons interested, and may be considered as given chiefly for the information of the court, and the convenience of the personal representative in the management of the estate.³

ment, and afterwards as often as once a year while the trust continues; but accounts later than the first are sometimes left discretionary with the court. See Mass. Pub. Stats. c. 144; Musick v. Beebe, 17 Kan. 47. Where assets come to the hands of the executor or administrator after a partial account, he is bound to render a supplementary account, including such assets, within a reasonable time afterwards. Witman's Appeal, 28 Penn. St. 376; Shaffer's Appeal, 46 Penn. St. 131. A representative's duty to file annual or partial returns is a statute requirement, and conditions not expressed in the statute cannot be interpolated. Koon v. Munro, 11 S. C. 139. Statutes set special periods for accounting where the estate is insolvent. Mass. Pub. Stats. c. 137.

¹ Coburn v. Loomis, 49 Me. 406; Clark v. Cress, 20 Iowa, 50; Goodwin v. Goodwin, 48 Ind. 584; Picot v. Bidle, 35 Mo. 29; Cavendish v. Fleming, 3 Munf. 198.

² Stayner, *Re*, 33 Ohio St. 481; Shep-

ley, J., in Sturtevant v. Tallman, 27 Me. 85; Stearns v. Stearns, 1 Pick. 157; Sumrall v. Sumrall, 24 Miss. 258; Stephenson v. Stephenson, 3 Hayw. 123; Mix's Appeal, 35 Conn. 121.

³ Musick v. Beebe, 17 Kan. 47; State v. Wilson, 51 Ind. 96; Sheetz v. Kirtley, 62 Mo. 417; Liddell v. McVickar, 6 Hals. 44; Snodgrass v. Snodgrass, 57 Tenn. 157.

In Massachusetts special administrators are held to account whenever required by the probate court; and public administrators, who have given a general bond, render an annual account of all balances in their hands, besides annual accounts as to each separate estate. Smith Prob. Guide, 163.

Annual and partial accounts are peculiarly valuable as serving to show the representative's liability, and for keeping the court and interested parties informed of the general condition of the estate while in process of settlement, and ascertaining whether the representative's bond should be increased. They

But, on the final account, the general fairness of the administration comes up properly for a final review. Such an account, in order to operate as conclusive upon all concerned, can only be rendered upon due publication of notice to creditors and all persons interested, unless their assent is expressed; the time for rendering it is when the estate has been fully administered, unless one's office for some reason sooner expires; it is properly for the protection of the representative, and as a final adjudication of all controversies. On this final account, errors and mistakes in all former accounts should be corrected, once and for all, and improper items stricken out; and disputes of charge, compensation, and allowance finally determined; nor is the allowance of previous partial accounts without notice to legatees or next of kin, conclusive on them, but they may object on the final account, and the court is bound to consider evidence from them disproving or reducing former items.¹ This final account, once examined and approved by the probate court, after due citation, and not reversed on appeal, operates as a final judgment; it concludes in general all the parties interested, and cannot be reopened or annulled in any court, except it be by direct proceedings in probate, or perhaps in chancery, for fraud or manifest error.²

afford *prima facie* evidence of the facts they state; and it is proper enough for interested parties to object, when the partial account is rendered, to the allowance of any item therein stated. Practically, indeed, the rendering of periodical accounts is often found to bring dissensions between the representative and parties in interest to an issue before the interests of the estate have suffered too far; while executors and administrators are thus kept to a diligent and faithful discharge of their duties, and the judge of probate may the better pacify or protect legatees and kindred when they and the representatives of the estate fail to harmonize.

¹ *Mix's Appeal*, 35 Conn. 121; *Brazeale v. Brazeale*, 9 Ala. 491; *Collins v. Tilton*, 58 Ind. 374. The fact that al-

lowance had been made by a former judge of the court by a mere approval, without a hearing or citation, does not affect the right to re-open before the subsequent judge. *Collins v. Tilton*, ib. And see *Bantz v. Bantz*, 52 Md. 686.

² *Austin v. Lamar*, 23 Miss. 189; *Brick's Estate*, 15 Abb. (N. Y.) Pr. 12. As to appeal, etc., see § *post*. See, as to the analogous case of guardianship accounts, Schoul. Dom. Rel. 3d ed. § 372, and cases cited. And see *Mayo v. Clancy*, 57 Miss. 674; *Seawell v. Buckley*, 54 Ala. 592; *Musick v. Beebe*, 17 Kan. 47. A final account allowed is voidable at the election of one not duly cited as entitled nor brought into the account. 54 Miss. 700. In New York practice, a surrogate may make an order opening a final accounting of executors

The broad distinction between partial and final accounts, is not, however, universally approved in American probate practice of late years. Thus, in Pennsylvania, where it was formerly usual to admit exceptions, when a final account was filed, to that or to any previous probate account, all partial accounts are, under later legislation, rendered, when confirmed absolutely and upon due consideration, and without an appeal, final and conclusive, in regard to all that they contain,¹ though not as to what may have been reserved for a future account.² In Massachusetts, too, and some other States, the policy is manifestly to discourage, at all events, the re-opening of disputes determined on one account, when later accounts are exhibited.³ But, in order to give a conclusiveness to partial accounts, it appears proper not only that no appeal should be taken, but also that the account should

or administrators for re-examination, at least to the extent of correcting specified errors apparent on the face of the account; but the power should be exercised only in rare instances and with great caution. *Decker v. Elwood*, 1 Thomp. & C. (N. Y.) 48; *Strong v. Strong*, 3 Redf. 477. Only a court of equity, and not a probate court, can open a settled account in some States. *Harris v. Stilwell*, 4 S. C. 19. Though such is not the rule. A final accounting does not bar proceedings for a distinct trust. 5 Hun, 16; 4 Redf. 180. The final settlement does not preclude further inquiry in regard to the assets of the estate in the hands of the representative not accounted for or passed upon. *McAfee v. Phillips*, 25 Ohio St. 374. Cf. 16 Ohio St. 274. But it concludes as against the representative, that what was charged in the accounting as assets was such. *McDonald v. McDonald*, 50 Ala. 26. And a final account regularly allowed is presumed to embrace everything which was the proper subject of inquiry. *Brown v. Brown*, 53 Barb. 217. See *Davis v. Cowden*, 20 Pick. 510; *Sever v. Russell*, 4 Cush. 518.

As to opening and reviewing probate

settlements in a court of chancery to correct mistakes and afford relief, see, in detail, U. S. Digest, First Series, Executors and Administrators, 4146-4250. There are various recent State enactments which relate to this subject, their tendency being, however, to conclude all such controversies in the probate court and upon appeal in regular course. See, on this point, 30 Ark. 66; 34 Ark. 117; 50 Ala. 319; 64 Ind. 79. One who retains the benefits is not competent to allege a fraud in the accounts. 81 Ill. 571. Nor will equity set aside a settlement because of illegal allowances to the representative where there is no proof that they were obtained by fraud or misrepresentation. 34 Ark. 63; 54 Mo. 200; 67 Mo. 247.

¹ Rhoad's Appeal, 39 Penn. St. 186.

² Shindel's Appeal, 57 Penn. St. 43. As, e.g., on a later account the representative may be charged with money received by him before the confirmation of the preceding account, and not accounted for. *Ib.*

³ Mass. Pub. Stats. c. 144, § 9; *Smith v. Dutton*, 4 Shepley, 308; *Cummings v. Cummings*, 128 Mass. 532; *Wiggin v. Swett*, 6 Met. 194.

have been allowed after the usual citation to parties interested, or their appearance or waiver of notice ; for, as in a final account, the decree of allowance ought not to bind those who were not made parties to the accounting.¹

§ 527. **Settlement upon a Final Accounting; Distribution, etc.**—The rendering of a final account to the probate judge or surrogate appears to be, strictly speaking, a proceeding distinct from the settlement thereof; that is to say, the executor or administrator sets forth in his accounts the true condition of the trust, and of his administration, without bringing into his statement the payments made to any of the distributees or residuary legatees on account. Usually, in our practice, a decedent's estate is closed in the probate accounting; payments made in true proportion to all proper parties being thus exhibited, without the formality of a further decree, as for distribution. But, when this course is pursued, the distribution statement or schedule should be kept distinct; for the probate accounting in theory settles nothing but the basis upon which distribution may afterwards be made in a proper tribunal, and ascertains what balance, if any, is left for that purpose.²

¹ *Supra*, § 523; *Crawford v. Redus*, 54 Miss. 700. Mass. Pub. Stats. c. 144, § 9, expressly provides that when such account is settled "in the absence of a person adversely interested, and without notice to him," such account may be opened on his application at any time within six months after the settlement thereof.

An executor or administrator having been surcharged or falsified on exceptions to his administration, all parties interested in the surplus are entitled to participate in the balance as finally ascertained, in due proportion, though some of them filed no exceptions to the account. *Charlton's Appeal*, 34 Penn. St. 437. It is prudent, when the accountant finds his account disputed in important respects, for him to request the party objecting to specify in writing

the items objected to; for then, the account being once settled, the particular items disputed and determined will be shown by the record. A Massachusetts statute provides that, upon the settlement of an account, all former accounts rendered in the course of settling the same estate may be so far opened as to correct a mistake or error therein; but that a matter which has been previously heard and determined by the court, shall not, without leave of the court, be again brought in question by any of the disputants. Mass. Pub. Stats. c. 144, § 9; *Cummings v. Cummings*, 128 Mass. 532; *Wiggin v. Swett*, 6 Met. 194.

² See *Ake's Appeal*, 21 Penn. St. 320; *Smith v. Van Kuren*, 1 Barb. Ch. 473; *Tappan v. Tappan*, 30 N. H. 50; *Fleece v. Jones*, 71 Ind. 340. Where the distributees or residuary parties in interest

In some States, therefore, the decree made upon an administrator's final accounting determines simply the amounts received and paid out by the representative, and the balance due from him to, or to him from, the estate; and a decree of distribution, settling the rights of residuary legatees or distributees, is afterwards in order.¹ The distribution of intestate estates lies peculiarly within the province and jurisdiction of American probate courts; and local statutes define the method by which the administrator or any one of the distributees, may on application to the probate court, obtain an appropriate decree.²

are clearly known, the representative is practically safe in settling with them on their several receipts for their respective proportions, and rendering his final account as upon such a distribution, thereby dispensing with formalities and needless delay. Legacies, in general, like creditors' claims, are paid upon proper vouchers.

The words "final settlement" in a statute may be construed not to signify the mere ascertainment of the final cash balance in the hands of the executor or administrator. A payment of that balance is also included, so that nothing shall remain to be done by him in his fiduciary character to complete the execution of the trust. *Dufour v. Dufour*, 28 Ind. 421.

It is irregular practice to petition for an account and for distribution together. 11 Phila. 43.

¹ *Johnson v. Richards*, 5 Thomp. & C. (N. Y.) 654; 15 N. J. L. 92; 7 Baxter, 406. A formal decree may be a needful preliminary to suing on the administrator's official bond.

² The decree of distribution, which is founded upon the final balance shown by the accounting, specifies the names of persons who are entitled to share in the estate and the amount payable to each. *Loring v. Steineman*, 1 Met. 204; *Smith Prob. Pract.* 196. A decree in favor of a distributee is conclusive as to amount, allowing for all previous ad-

vancements. *Cousins v. Jackson*, 49 Ala. 236.

After an administrator has made distribution without judicial direction, he is personally liable, if others entitled to distribution appear of whose existence he had no knowledge. 2 Call (Va.) 95.

In some States an order of distribution is imperative. 19 La. Ann. 97. Accounts, with items showing partial and unequal payments to distributees, do not supply the correct balance upon which distribution is to be made. See 53 Ga. 282.

The notice requisite for a decree may be prescribed by statute, otherwise the notice is such as the court in its discretion shall deem proper. 1 Met. 204. See 49 Wis. 592; 60 Ill. 27. The probate court has no authority to make an order for distribution to the assignee of a distributee's share. *Knowlton v. Johnson*, 46 Me. 489; *Holcomb v. Sherwood*, 20 Conn. 418; *Portevant v. Neylans*, 38 Miss. 104. And it is no valid objection to a decree of distribution that it was made on its face in favor of parties who were not applicants for the decree, or whose shares had been satisfied or released. *Sayre v. Sayre*, 16 N. J. Eq. 505. Nor should the administrator be thus decreed to apply the distributee's share to a debt due to the administrator personally. 13 Ala. 91; 3 Grant (Pa.) 109; 25 Miss. 252. Nor to make deduction from the

But, as to testate estates, a probate court has no inherent jurisdiction to decide who are entitled as legatees under the will; nor can it, in the absence of some enabling act, decree to whom, or at what time, legacies, or the residuary fund, shall be paid.¹

§ 528. **Conclusiveness of the Final Settlement in the Probate Court.**— The final settlement of an executor or administrator with the probate court is conclusive, operating as the judgment of a court of competent authority, with jurisdiction of the subject-matter and of the person, and cannot be called in question, except by a direct proceeding, such as appeal or writ of error;² and only in the probate court when impeached for fraud or manifest error; though, if the proceedings in that court were such that they may be treated as a nullity on account of fraud, the executor or administrator may be cited to account there anew.³ The probate settlement remains conclusive evidence not only of the fact of payments, as specified, but of the validity of those payments;⁴ nor can the decree of the probate court, duly allowing the final account of the representative, be collaterally impeached; as in an action at law against him, upon a claim against the deceased.⁵

share of any one on account of a debt he owes to the estate. 17 Mass. 81. But such equities may be regarded in the course of compliance with a decree of distribution. See 6 Ired. Eq. 341; 2 Barb. Ch. 533; 29 Penn. St. 208; 3 Cranch, C. C. 61. And it would appear that a *bond fide* payment made under the decree of distribution to the attorney in fact, or actual assignee of the distributee named therein, is a compliance with the order. *Marshall v. Hitchcock*, 3 Redf. (N. Y.) 461.

¹ *Smith v. Lambert*, 30 Me. 137; *Cowdin v. Perry*, 11 Pick. 503. Legacies in many States may be sued for and recovered at common law. *Farwell v. Jacobs*, 4 Mass. 634; *Smith v. Lambert*, 30 Me. 137. Beyond this, the subject is more especially one of chancery juris-

diction, and the probate records are not conclusive of the rights of such parties, though doubtless important evidence. But statutes may affect this question, enlarging the powers of a probate court to that end. *Sanford v. Thorp*, 45 Conn. 241.

² *Caldwell v. Lockridge*, 9 Mo. 362; *Barton v. Barton*, 35 Mo. 158; *Austin v. Lamar*, 23 Miss. 189; *Brick's Estate*, 15 Abb. (N. Y.) Pr. 12; *Smith Prob. Pract.* 183.

³ *Davis v. Cowden*, 20 Pick. 510; *supra*, § 526, note; *Decker v. Elwood*, 1 Thomp. & C. 48.

⁴ 1 Hoffm. 202; *Burd v. McGregor*, 2 Grant, 353; 52 Cal. 403.

⁵ *Parcher v. Bussell*, 11 Cush. 107; *Harlow v. Harlow*, 65 Me. 448; *Sanders v. Loy*, 61 Ind. 298.

While a decree of the probate court, settling an executor's or administrator's final account, partakes of the nature of a final judgment, its conclusiveness is nevertheless restricted to the matters involved, and the items, together with the surplus, as passed upon and shown of record.¹

Nor is the decree of distribution, as to the balance shown by the administration accounts, a payment.²

§ 529. Perpetuating Evidence of Distribution and procuring a Final Discharge. — It is provided expressly in various States, that the executor or administrator shall have his final discharge, and may perpetuate the evidence of his payments or distribution of the surplus, as of record. The usual course is for him to return the court's decree of distribution, with indorsements, showing full payments made under it, or within a specified time to present what is in substance a final account, exhibiting the distribution of the balance for which he was accountable to the parties entitled.³ Unclaimed

¹ A balance found due upon formal accounting may in some cases be a cash balance; and a careful executor or administrator will take heed that items of doubtful value, which may affect a just cash balance for distribution, are duly stated at the final hearing, and weighed by the court. But the balance, as found on such accounting, is in strict truth a balance, not of money, but of the estate undisposed of remaining for distribution, and the schedules will frequently show that this balance is made up of various items of personal property not reduced to cash, which, at their stated valuation, the representative stands ready to transfer. Where, therefore, the representative finds himself unable to use the assets upon a cash valuation, he should apply to the probate court for corresponding relief; and the order of distribution may be made out or amended in conformity to the facts, and as essential justice requires. But, after the time is past for the representative to distribute the surplus to those entitled thereto, and such distribution may be assumed

to have taken place, he is no longer concerned in asking relief of this character. *Sellero's Appeal*, 36 Conn. 186. That one may be cited to account for what does not appear on his accounts, see *Flanders v. Lane*, 54 N. H. 390.

² It is not a payment so as to discharge the executor or administrator, nor is it a payment so as to exonerate the fund distributable. The decree gives to the distributee a remedy against the executor or administrator personally for his proportion of the fund found to be in the latter's hands, but this does not impair his remedy against the fund itself. Nothing short of actual payment, or some act of the distributee to its prejudice, will exonerate the trust fund from the distributee's claim. *Brown, J.*, in *Clapp v. Meserole*, 38 Barb. 661. And see, as to the form of such decree of distribution, *McCracken v. Graham*, 14 Penn. St. 209.

As to the effect of a settlement of the residue out of court, after a partial settlement in court, see 27 Ohio St. 159.

³ The Massachusetts statute provides

moneys, which the court has ordered paid over, may be placed on deposit with the judge, or in the public treasury, according as local enactments prescribe, thereby discharging the executor or administrator, and his sureties, from all further responsibility for the funds.¹

In some States it appears to be the practice of the probate court to enter a judgment of dismissal by way of discharging liability on the part of the personal representative.²

§ 530. **Appellate Jurisdiction as to Probate Accounting.**—Appellate jurisdiction from our probate tribunals is carefully exercised in most States, as respects the probate accounting just set forth. And, upon appellate proceedings, the supreme court declines to act as if entertaining an original jurisdiction over the account. For, as it is said, the court of probate can only be deprived of its statute jurisdiction for the settlement of a personal representative's accounts by some process or course of proceeding which would legally remove the settlement to another tribunal. And, hence, probate jurisdiction remains, although the personal representative, who had before been cited to settle his accounts, had neglected to do so, and leave had been granted to bring a suit upon his bond; no suit having been commenced.³ Nor will the supreme court, as a court of chancery, resettle an administration account alleged to have been fraudulently settled in the probate court.⁴

that when an executor or administrator has paid or delivered over to the persons entitled thereto the money or other property in his hands, as required by a decree of the probate court, he may perpetuate the evidence thereof by presenting to such court, within one year after the decree is made, an account of such payments, or of the delivery over of such property; which account, being proved to the satisfaction of the court, and verified by the oath of the party, shall be allowed as his final discharge, and ordered to be recorded. Such discharge shall forever exonerate the party and his sureties from all liability under such decree, unless his account is im-

peached for fraud or manifest error. Mass. Pub. Stats. c. 144, § 12.

¹ Mass. Pub. Stats. c. 144, § 16.

² 18 Ga. 346; 10 Ind. 528. An order of discharge upon a final account will not be regarded as a final settlement if the probate records show property undisposed of and debts remaining unpaid. 37 Iowa, 684. But, if a settlement is reopened, all concerned may have the benefit. 56 Ga. 297.

³ *Sturtevant v. Tallman*, 27 Me. 78. Appeal does not lie from the refusal of an account informally presented. 50 Ala. 39.

⁴ *Jennison v. Hapgood*, 7 Pick. 1; *Sever v. Russell*, 4 Cush. 513. As to

So, too, it is held that former accounts from the allowance of which no appeal was taken, and the matters passed upon in them, are not subject to a revision and readjustment upon an appeal from the allowance of a later account in which the same question was not before the probate judge for consideration.¹

Where a mistake is made in the settlement of a probate account, the course is to apply to the judge of probate for its correction, or to state the amount claimed in a new account; unless, when the mistake is discovered, the party has a right of appeal to the supreme tribunal, and may there have it corrected.² When the account of the representative has been allowed by the probate judge, and no appeal is taken, it cannot be revised above; and, under such circumstances, the probate judge's decision that no mistake has been made, concludes the controversy.³ If the probate court reopens, or refuses to reopen, a final accounting in a proper case, there lies a direct remedy by appeal.⁴

§ 531. **Rendering Accounts in Case of Death, Resignation, Removal, etc., of Representative.**— American statutes provide explicitly for the rendering of probate accounts in case of a vacancy in the office. Thus, when one of two or more joint executors or administrators dies, resigns, or is removed before the administration is completed, the account is rendered by the survivor or survivors.⁵ And when a representative dies,

the States where liberal chancery powers are asserted by way of a concurrent jurisdiction with probate tribunals, see *supra*, § 522.

¹ *McLoon v. Spaulding*, 62 Me. 315; 27 Me. 78; 49 Me. 406, 561.

But, in Massachusetts, the supreme court, while disclaiming to act otherwise than as an appellate tribunal with reference to probate accounts, construes the latest legislation, not only as modifying the former rule of conclusiveness, but so that, without any formal petition alleging mistake or error, objections made to allowing a later probate account may amount substantially to an application to have the former accounts reop-

ened; and sustains a reopening on appeal, although an appeal from the former account was taken to the supreme court and there determined. *Blake v. Pegram*, 109 Mass. 541. And see *Williams v. Petticrew*, 62 Mo. 460; *Seymour v. Seymour*, 67 Mo. 303; *Sherman v. Chace*, 9 R. I. 166.

² *Stetson v. Bass*, 9 Pick. 27; *Coburn v. Loomis*, 49 Me. 406.

³ *Coburn v. Loomis*, 49 Me. 406; *Arnold v. Mower*, *ib.* 561.

⁴ *Githens v. Goodwin*, 32 N. J. Eq. 286. As to reopening a settled account by proceedings in the probate court, see *supra*, § 526.

⁵ Mass. Pub. Stats. c. 144.

not having settled his sole account, a final account should be rendered by his own executor or administrator; and it has been held, that it may be settled by the administrator of one of his sureties, for the protection of the bond;¹ since, for a deficit beyond the actual assets to be administered upon, the sureties of a deceased executor or administrator who proves a defaulter in his trust, are answerable, and not the deceased defaulter's own representatives.²

Statutes provide for the closing of accounts by a representative who resigns, or is discharged from his trust. Thus, it is declared, that an executor or administrator shall not be permitted to resign without first settling his accounts; and, on such rendering, the court should have the account carefully examined and approved like any other final account.³ But, without appropriate legislation, the probate court cannot, perhaps, order an account from one whose resignation has already been accepted.⁴ The final probate decree, on settlement of the accounts of a removed representative, will conclude his sureties,⁵ who, together with himself, are answerable for any defalcation in the trust.

It is not to be inferred, however, that a final settlement upon the accounts of a representative who has died, resigned, or been removed, while in the exercise of his functions, is a "final settlement," so to speak, of the estate; for it is rather a transfer of the predecessor's just balance to the successor.⁶ The accounts of a successor should never be blended with those of his predecessor.⁷

¹ *Curtis v. Bailey*, 1 Pick. 199.

² See *supra*, § 146. But see 2 Pen. (N. J.) L. 562.

³ *Supra*, § 156; *Waller v. Ray*, 48 Ala. 468; *Sevier v. Succession of Gordon*, 25 La. Ann. 231. The parties to this final accounting are, besides next of kin, legatees, or distributees, as the case may be, the successor in the trust. *Waller v. Ray*, 48 Ala. 468. Where one is discharged or removed, persons interested as creditors, etc., have the usual right of objecting to the account. *Poulson v. Frenchtown Bank*, 33 N. J. Eq. 618.

⁴ See 6 Tex. 130.

⁵ *Kelly v. West*, 80 N. Y. 139. Statutes in some States authorize the probate court, upon a final account by a representative removed from his trust, to render a decree against him for the balance in favor of the successor. 13 Ala. 749. See, as to remedies for recovering a balance found due on the account of a predecessor deceased, *Munroe v. Holmes*, 9 Allen, 244; *Bingham, Re*, 32 Vt. 329.

⁶ See 40 Miss. 747.

⁷ *Hamaker's Estate*, 5 Watts, 204.

§ 532. **Accounts by Co-Executors or Co-Administrators.**—

The accounts of co-executors or co-administrators may, in the practice of some States, be rendered on the oath of one of them. In Pennsylvania and some other States, however, joint representatives may keep and file separate accounts, each charging himself with a part of the estate;¹ and, it is held, that on the settlement of a subsequent account by one, he is not chargeable with the balance in the hands of the other; however might be the case in a suit upon their joint bond.² There may be advantage in such a course; for, on general principle, the settlement of a joint account by co-executors or co-administrators, and its confirmation, showing a cash balance in their hands, admits and adjudges their joint liability; and a division of the fund between them does not sever that liability;³ though, as to securities which appear to be uncollected, by their joint accounts, no conclusive liability, of course, arises.⁴ The separate accounts of co-representatives cannot be combined in making the distribution; and, having filed separate accounts, they have no joint duty to distribute.⁵

§ 533. **Effect of Lapse of Time upon Accounts.**— Lapse of time may justify a refusal to order an account of administration; especially, in connection with other circumstances, such as the death of all the parties cognizant of the transactions, destruction of the county records, and loss of papers; for, otherwise, there would be danger of injustice to the deceased personal representative.⁶ Under ordinary circumstances, however, a lapse of time less than twenty years appears to constitute no bar to the ordering of a probate account;⁷ but,

¹ Davis's Appeal, 23 Penn. St. 206; Bellerjeau v. Kotts, 4 N. J. L. 359.

² Davis's Appeal, ib.

³ Duncommun's Appeal, 17 Penn. St. 268; Laroe v. Douglass, 13 N. J. Eq. 308.

⁴ Lightcap's Appeal, 95 Penn. St. 455.

⁵ Heyer's Appeal, 34 Penn. St. 183. Co-executors, who have received and

inventoried a trust fund held by their testator as executor, and have jointly settled their final probate account, are jointly chargeable with the trust balance ascertained to be in their hands. Schenck v. Schenck, 16 N. J. Eq. 174.

⁶ Stamper v. Garnett, 31 Gratt. 550. As to a presumption of settlement after lapse of time, see 9 Phila. (Pa.) 344.

⁷ Campbell v. Bruen, 1 Bradf. 224.

where the administration has been closed, and the representative formally discharged, it may be different.¹

But, however it may be with a judicial accounting, a court may presume, a considerable time having elapsed since the estate should have been settled and the functions of the representative terminated, that the debts have all been paid, in fact, and the affairs of the estate finally and justly settled. Final settlements ought to be seasonably and directly assailed, in order to avoid their effect as judgments importing verity.² Where, an account has been finally adjusted many years, those concerned acquiescing, apparently, in the settlement, it will not be reopened, except upon good cause shown for the delay,³ nor, usually, except to correct mistakes apparent; but the representative may be cited at any time, to account for assets not included in his settled accounts, especially if they come to hand at a later date.⁴

§ 534. **No Account required from Residuary Legatee giving Bond to pay Debts, etc.**—Where a residuary legatee has given bond as executor, to pay the testator's debts and legatees, a bill in equity cannot be maintained against him for an accounting for assets and administration in chancery; nor, of course, can a probate accounting be compelled. For the assets of the estate become part of his general property, and are no longer subject to the enforcement of a trust in favor of other legatees;⁵ though his own estate is liable, like that of any debtor, for debts and legacies, and his bond affords security for the benefit of all such claimants.⁶

¹ See *Portis v. Cummings*, 14 Tex. 139. Local methods are not uniform in this respect.

² *State Bank v. Williams*, 6 Ark. 156; *Williams v. Petticrew*, 62 Mo. 460. See Schoul. Dom. Rel. § 372; *Gregg v. Gregg*, 15 N. H. 190; *Pierce v. Irish*, 31 Me. 254; *Smith v. Davis*, 49 Md. 470.

³ See *Davis v. Cowden*, 20 Pick. 510, where the delay shown was not such as imputed acquiescence in the account.

⁴ *McAfee v. Phillips*, 25 Ohio St. 374; *supra*, § 526.

⁵ *Clarke v. Tufts*, 5 Pick. 337; *McElroy v. Hatheway*, 44 Mich. 399.

⁶ *Copp v. Hersey*, 31 N. H. 317; *supra*, § 249.

CHAPTER II.

CHARGES AND ALLOWANCES UPON ACCOUNTING.

§ 535. **What is to be charged to the Representative, and what allowed Him.**— In the present chapter we shall consider (1) what may be charged to the executor or administrator in his accounts; and (2) what may be allowed him therein. We shall here suppose the account to have been prepared with items of the former kind debited to him as under schedule A., and those of the latter kind credited under schedule B.¹

§ 536. **Representative should charge Himself with Inventory Valuation as a Basis; Corrections of Value, etc.**— *First*, as to charges. While bookkeeping accounts are usually conducted on the basis of receipts or payments in cash or their equivalent, the balance being struck accordingly, a peculiarity of accounting in most of our probate courts is, that the accountant shall charge himself, first of all, with the total amount of personal property as returned in the inventory.² Accordingly, he is compelled to carry forward in schedule A., the bulk of personal assets on the appraisers' valuation; asking an especial credit in the schedule B., should any of these assets realize at a loss when disposed of, or be worth less for a distribution, than at their valuation; and, accounting, in fact, for all assets which have come to either his possession or knowledge, and not for his actual receipts alone. On the other hand, should particular assets fetch more, or be worth more in computing the final balance, than the amount stated

¹ See *supra*, § 524. Every item of partnership affairs, if the surviving partner be executor. 2 Bradf. 165; 17
 receipt and expenditure should be distinctly entered in the account. Hutchinson's Appeal, 34 Conn. 300; Jones, Abb. (N. Y.) Pr. 165.
Re, 1 Redf. 263; 4 Day, 137. The ³ See *Bogan v. Walter*, 12 Sm. & M. 666.
 account should include a statement of

in the inventory, the representative must charge himself with the excess. So, too, if assets inventoried as desperate and valueless, turn out to be worth something, their proper worth, or what they have actually realized, is to be debited to him in the account. For, an inventory appraisal is *prima facie* and not conclusive proof of the representative's liability for a corresponding amount; the real test of liability by which his accounts shall be settled being, whether he has bestowed honesty and due diligence in collecting, realizing upon, preserving, and disbursing the assets.¹

§ 537. **Amounts to be added; Representative charged with Personal Assets not inventoried; Profits, Income, Premiums, Interest, etc.**—Indeed, amounts received from all sources not included in the inventory, of the nature of personal assets, should be charged to the accountant, by suitable items, in the administration account; not specific gains upon the inventory valuation alone, but new assets, or such as from ignorance, inadvertence, or any other cause, were omitted from the inventory itself,² and the income, interest, profits, and usufruct of every description, derived out of the assets in the course of a prudent and faithful administration; including premiums received, and interest with which the representative ought to be charged, because of culpable carelessness or his personal appropriation and misuse of the assets.³ The profits accruing out of the decedent's estate should all be accounted for, whether they accrue spontaneously or by the representative's acts.⁴

¹ Weed v. Lermond, 33 Me. 492; Craig v. McGehee, 16 Ala. 41. The items of the inventory need not be repeated in the account; but only the gross amount debited. Sheldon v. Wright, 7 Barb. 39.

² But, by the practice of some States, a new inventory should be filed in such cases. *Supra*, § 230.

³ Sugden v. Crossland, 3 Sm. & G. 192; Allen v. Hubbard, 8 N. H. 487; Liddell v. McVickar, 11 N. J. L. 44. Income should be stated as a separate item from the principal. 11 Phila. 113;

Stone v. Stilwell, 23 Ark. 444. If there is no increase, profit, etc., that fact should be stated. 1 Redf. (N. Y.) 263.

⁴ Wms. Exrs. 1657, 1847. And see Sugden v. Crossland, 3 Sm. & G. 192.

The discussion of a representative's liability, in former chapters, may sufficiently show what an executor or administrator should be charged with. A cardinal principle in all trusts, already adverted to, is that the fiduciary shall make no personal profit out of the trust beyond what a court may fitly allow him by way expressly of compensation

§ 538. **Charging the Representative with Interest.** — Chancery and probate courts, in modern practice, will compel the executor or administrator to charge himself in his account with interest, and, in gross instances, with compound interest, where he has abused his trust. This is a doctrine applicable, both in England and America, to all trustees who prove delinquent or dishonorable in the management of the estate confided to them. The charge appears to be supported on either of two sufficient grounds : one, that, by perverting the fund in question to his own use, the fiduciary has made a probable profit for which interest, or compound interest, may be supposed a fair equivalent ; the other, that loss of interest, occurring through his remissness or misconduct, should be made up to the fund. In other words, all profits made with trust moneys, belong to the trust ; and, furthermore, a culpable failure to make profit for the estate, out of funds which should have been made productive, is a waste.¹

for his services; and that, whatever the gains out of the assets, whether in the course of a rightful management or a perversion of his trust, shall go to enhance the fund, and not to enrich himself, and be duly accounted for. *Supra*, §§ 322, 332. Profits out of a lease belonging to the estate, profits out of a trade of the decedent pursued by the representative, profits out of a purchase of assets, profits out of an investment made with the assets, profits arising from a composition, discount, or deduction of a claim upon the estate, all come within this broad principle. Purchases of assets, or of the claims of creditors, legatees, or distributees upon the estate, by the representative, are, if not necessarily void, treated, at all events, with marked disfavor, and may usually be avoided by interested parties. *Supra*, §§ 358, 363. And see *Wms. Exrs.* 1842, and Perkins's note; *Cook v. Collingbridge*, Jacob, 607; *Hall v. Hallett*, 1 Cox, 134; *Wedderburn v. Wedderburn*, 22 Beav. 100. The personal representative is not authorized to take assets at their appraised value to his own use and make what profit he may

out of them. *Weed v. Lermond*, 33 Me. 492. Bonuses from borrowers belong to the trust estate. *Savage v. Gould*, 60 How. Pr. 217. A loss of property, occurring through the representative's culpable neglect to apply for an order of distribution, may be charged to him. *Sanford v. Thorp*, 45 Conn. 241. *Cf.* 8 N. H. 444.

¹ Trustees in general are made liable for interest, where they delay unreasonably to invest, or mingle the trust money with their own, or neglect to settle their accounts or pay over the money, or disobey directions of the will or of a court as to the time or manner of investing, or embark the funds in trade or speculation without authority, etc. *Perry Trusts*, §§ 468-472. Where extra profits or bonuses are made by a trustee, they belong to the estate. *Ib.* § 468. Compound interest is rarely charged by the English chancery unless there was more than mere negligence; some wilful breach of trust in effect. *Ib.* § 471. Though, on principle, it would appear that if the trustee has probably derived actual profit of interest, compounded with period-

Executors and administrators, however, are charged with more reluctance than trustees, for simply letting funds lie idle, since their primary function is to administer and not to invest;¹ but, for any wilful perversion of the assets, they are doubtless chargeable.² During the first year, after the de-

ical rests, from the manner of using the money, compound interest should be charged him by way of a just accounting, independently of good or bad faith on his part.

See as to compound interest in cases of administration, *English v. Harvey*, 2 Rawle, 305; *Slade v. Slade*, 10 Vt. 192; *McCall, Estate of*, 1 Ashm. 357; *Scott v. Crews*, 72 Mo. 261; *Clark, Estate of*, 53 Cal. 355; *Wms. Exrs.* 1851, and Perkins's note; *Jones v. Foxall*, 15 Beav. 388; *Jennison v. Hapgood*, 10 Pick. 77; *Blake v. Pegram*, 109 Mass. 541; 2 Barb. Ch. 213; *Hook v. Payne*, 14 Wall. 252.

¹ *Supra*, § 322; *Wms. Exrs.* 1844-1851, and Perkins's notes.

² Executors and administrators are liable for interest if they mingle assets with their private funds. *Griswold v. Chandler*, 5 N. H. 492; 1 Johns. Ch. 50, 527, 620; *Jacob v. Emmett*, 11 Paige, 142; 4 Cranch, C. C. 509; *Grigsby v. Wilkinson*, 9 Bush. 91; *Troup v. Rice*, 55 Miss. 278; 53 Cal. 355. And see 11 Ala. 521. Or, where they are unreasonably delinquent in paying, investing, or disbursing funds, as the law, the testator, or the court may have expressly directed. 3 La. Ann. 353, 574; *Smithers v. Hooper*, 23 Md. 273; 6 Daly, 259; *Hough v. Harvey*, 71 Ill. 72. And this delinquency may involve a delinquency in accounting. 23 Md. 273; *Lommen v. Tobiason*, 52 Iowa, 665. Or, where the money is used for private gain and speculation. *Davis, Matter of*, 62 Mo. 450. Where they fail to account for interest or profits actually produced by the assets, they are liable to be charged with the highest rate at which profit might have been made, and, at all events, with interest

at current rates. *Ringgold v. Stone*, 20 Ark. 526; 3 Harring. 469; *English v. Harvey*, 2 Rawle, 305. A conversion of productive property into cash, long before it becomes needful for the purposes of the estate, may be culpable negligence, so as to charge the representative with interest. *Verner, Estate of*, 6 Watts, 250.

Upon the executor's or administrator's own debt to the estate, the usual rules of interest apply, as to other debtors. *Supra*, § 208.

Interest may be recoverable from an executor on legacies, and, perhaps, on debts or claims which are not seasonably paid, and whether he shall be reimbursed from the estate depends upon his own conduct as justifying the delay or not. *Supra*, §§ 440, 481.

See *Saxton v. Chamberlain*, 6 Pick. 423, as to examining the executor or administrator upon oath, in order to ascertain whether he is liable for interest. Interest actually received must of course be accounted for. *Supra*, § 537. And, if a representative improperly employs funds in trade or speculation, the beneficiaries may elect to take the profits instead of interest. *Wms. Exrs.* 1847; *Rocke v. Hart*, 11 Ves. 61; *Robinett's Appeal*, 36 Penn. St. 174; *Supra*, § 338. Where an executor or administrator dies in office, liability for interest may be suspended while the estate is unrepresented. 6 Rich. 83. On improper payments disallowed in his account, one is not readily to be charged with interest. *Clauser's Estate*, 84 Penn. St. 51. As to interest on uncollected claims, see *Strong v. Wilkinson*, 14 Mo. 116.

One who has diligently and faithfully discharged his trust of administration

cedent's death, more especially, the person who administers must often keep large sums in his hands lying idle, and negligence is not readily inferred from such conduct, but often the reverse; though, to keep money long in his hands, unproductive, might charge him.¹ Whether the personal representative shall justly be charged with interest on funds belonging to the estate, the particular circumstances in each case must determine. American practice does not appear to favor charging the representative with interest upon funds which he is prepared to disburse, and deny him his commissions or compensation besides, unless some wilful default be shown.²

§ 539. **Charges on Account as Concerns Real Estate or its Proceeds or Profits.**—Real estate, we have seen, may be inventoried under a separate head; but it is the amount of personal property alone, as returned in the inventory, for which a representative is primarily chargeable in account, since one does not, in that capacity, deal usually with a decedent's real estate, unless an emergency arises.³ Nor do rents of land go properly into an administration account, to be blended with items of personal assets; as the outlay

is chargeable only for the interest he has made. 11 N. J. L. 145; 6 Dana, 3; 16 S. & R. 416. And for a mere delay in making returns, where the collection, management, and disbursement of assets has been prudent and honorable, interest is not usually imposed. *Binion v. Miller*, 27 Ga. 78. But, if such delay involves the beneficiaries of the estate in great cost and trouble, it may, perhaps, be otherwise. *Ib.* See also *Davis, Matter of*, 62 Mo. 450. Closing a deposit which bore interest, and transferring the fund to a bank which pays no interest, before it was necessary to do so, does not render the executor or administrator liable for interest, provided he does not mingle it with his own moneys, or use it for his own profit, or deposit it in his own name, or neglect unduly to disburse or settle his accounts. *Wms. Exrs.* 1844; *McQueen, Estate of*, 44 Cal. 584; 12 S. C. 422.

¹ *Wms. Exrs.* 1844, and *Perkins's* note; 2 Cox, 115; 3 Bro. C. C. 73, 108, 433; *Ashburnham v. Thompson*, 13 Ves. 401. In *Griswold v. Chandler*, 5 N. H. 497, it is observed that where the administrator, without any just reason, retains money in his hands unemployed, when it ought to be paid over, or receives interest for money which belongs to the estate, or applies it to his own use, he ought to be charged with interest, but not otherwise. And see *Stearns v. Brown*, 1 Pick. 531; *Knight v. Loomis*, 30 Me. 204; *Ogilvie v. Ogilvie*, 1 Bradf. 356. Pursuance of duty, in accordance with the principles we have discussed, affords a fair test. An executor charged with special duties may be bound to invest and not leave funds long idle.

² *Troup v. Rice*, 55 Miss. 278; *Lloyd's Estate*, 82 Penn. St. 143.

³ *Supra*, §§ 213, 509.

or distribution of such funds follow distinct rules.¹ If the heirs or devisees permit the representative to manage real property, his account becomes most naturally a special account with them as their attorney.

Where, however, real estate has been sold under a license for the payment of debts, or in some other manner lands or their proceeds come into the hands of the executor or representative, to be managed and dealt with as personal assets, they enter into the usual administration account together with rents and profits subsequently accruing; the representative taking due care to settle the same with those properly entitled thereto.² Real estate may well be accounted for under such circumstances, under special schedules; and so with all funds set apart agreeably to law or a testator's directions for special purposes. In a few States, moreover, as we have seen, both the real and personal property of a decedent is temporarily managed by his executor or administrator.³

§ 540. **Charges on Account; Miscellaneous Points.**— In adjusting an administration account, the probate court has authority to require that assets not inventoried nor credited by the executor or administrator, shall nevertheless be accounted for.⁴ And the validity of a claim against the executor or administrator in favor of the estate, as growing out of his misappropriation or abuse of trust, may thus be established.⁵

§ 541. **Allowances to the Representative; Disbursements, Losses, etc.**— *Second*, as to what shall be allowed an executor or administrator in his accounts. The opposite schedule of the administration accounts, or schedule B., exhibits amounts

¹ *Supra*, § 510; 11 Phila. 118.

² See *Boyd, Re*, 4 Redf. 154. Chat-tels real, leases, etc., of course, if sold or underlet, enter into administration accounts with personal property. *Supra*, § 223. See *Gottsberger v. Smith*, 2 Bradf. 86.

³ *Supra*, § 510.

⁴ *Boston v. Boylston*, 4 Mass. 318; *Hurlburt v. Wheeler*, 40 N. H. 73; *Wills v. Dunn*, 5 Gratt. 384.

⁵ *Gardner v. Gardner*, 7 Paige, 112; *Hovey v. Smith*, 1 Barb. 372. If, in the administration account, the representative does not charge himself with any property whatever, but enters simply, "the appraisers made no return of personal property," the court does not, by decreeing allowance, find that there was no property, etc. *Moore v. Holmes*, 32 Conn. 553.

paid out in detail, and such sums, by way of charge to the estate, as the representative may claim for allowance. As to the amounts paid out, all proper disbursements made by the executor or administrator with due regard to rules of priority and limitations as to creditors, in the course of settling the estate, should here be credited; and whether the debt or claim originated with the decedent, or with himself, he is entitled to its allowance and credit, if it be fitly charged against the estate on the general principles of law which apply to administration.¹

Following the general maxims, elsewhere fully discussed, each credit should be allowed according to what was honestly and prudently disbursed. If the representative has paid off claims at a discount, the estate shall reap the benefit;² while, for what he may have paid out imprudently, or dishonestly, or illegally, full credit cannot be allowed.³ The same considerations hold true of paying allowances to widow or children, legacies and distributive shares. As distribution can only be safely made upon a final surplus, an administration account which credits all advancements to distributees, as they happen to be made, without reference to the respective shares and their amounts, is erroneous in form.⁴ Disbursements by way of distribution are to be reckoned on a division of the balance, all distributees being treated fairly.

Where assets realize less on sale or collection, or otherwise prove less valuable than as appraised in the inventory, the loss or depreciation should be stated by way of credit;⁵ and if proper, allowance will be made accordingly.⁶ Nothing can be allowed one, however, inconsistent with the just fulfilment of his fiduciary obligations.

¹ *Supra*, § 441; *Edelen v. Edelen*. "Expenses of settling the estate" ought to be specified by items, not allowed as a gross sum. 30 Conn. 205.

² *Paff v. Kinney*, 1 Bradf. Sur. 1; *supra*, § 638; *Carruthers v. Corbin*, 38 Ga. 75; *Chevallier v. Wilson*, 1 Tex. 161. See 8 N. H. 444.

³ *Supra*, § 431.

⁴ *Pearson v. Darrington*, 32 Ala. 227;

Rittenhouse v. Levering, 6 W. & S. 190; *Adair v. Brimmer*, 74 N. Y. 539.

⁵ For, reckoning upon the basis of an inventory value, the accountant debits himself with gain, and credits himself with loss, instead of accounting for gross amounts actually realized.

⁶ *Supra*, § 362. As upon a sale of stock. *Jones, Ex parte*, 4 Cr. C. C. 185; *Jones, Re*, 1 Redf. 263.

§ 542. **Allowances to the Representative ; Subject continued ; his Reasonable Expenses, etc.** — Disbursements credited may include expenses of last sickness, the funeral and burial expenses, the outlay for cemetery lot and monument, all of which have been sufficiently discussed ;¹ together with those other preferred claims, commonly styled the charges of administration, as to which last, the representative submits his claim, as for a personal allowance, more directly to the discretion of the court upon accounting. For an executor or administrator cannot pay himself ; but his compensation is judicially decreed, either expressly or by the allowance of his account.² All reasonable charges incurred for the benefit of the estate are to be allowed to a faithful representative, together with a reasonable recompense for his trouble.³ And thus may he be indemnified against loss upon contracts relating to the estate, where he has necessarily incurred a personal liability.⁴

Thus, where the executor or administrator pays a debt or discharges an obligation, which constituted a just charge against the estate, out of his private funds, he may claim an allowance for the same in his account.⁵ And though he should have paid prematurely, yet for that which, regarding legal priorities, was then justly payable, he may claim remuneration.⁶ Payments made in good faith, under a *de facto* appointment, may be allowed, notwithstanding a revocation of the appointment afterwards.⁷ A sacrifice of assets to meet obligations may be justified as not unreasonably imprudent.⁸ And, where the proper disbursements exceed the receipts, relief may be had from other property belonging to the estate, as from the decedent's lands, if the personal assets

¹ See *supra*, § 421. And as to necessities for support of the family, see *supra*, § 448.

² See *Collins v. Tilton*, 58 Ind. 374.

³ *Nimmb v. Commonwealth*, 4 H. & M. 57; *Pearson v. Darrington*, 32 Ala. 227; *Edelen v. Edelen*, 11 Md. 415; *Glover v. Halley*, 2 Bradf. 291; *Clarke v. Blount*, 2 Dev. Eq. 51; *Wilson, Re*, 2 Penn. St. 325. But see *supra*, § 315.

⁴ *Supra*, § 259.

⁵ *Woods v. Ridley*, 27 Miss. 119; *Watson v. McClanahan*, 13 Ala. 57.

⁶ *Johnson v. Corbett*, 11 Paige, 265.

⁷ *Bloomer v. Bloomer*, 2 Bradf. 339; *supra*, § 160.

⁸ Or, of course, as necessary, in order to comply with the law. *Wingate v. Pool*, 25 Ill. 118.

prove insufficient.¹ The charge of interest by a representative, for payments from his own means, is viewed with suspicion; yet interest may be allowed him on sums advanced by him, for necessary outlays to preserve the assets or for debts carrying interest.²

But special costs and expenditures, incurred through the representative's own culpable carelessness or misconduct, he cannot fasten upon the estate.³ Nor can he claim interest from the estate, for debts paid and advances from his private funds, where he might have met such demands seasonably out of the assets.⁴ Nor be credited with payment made for debts unauthorized by law, from a sense of honor and to save family disgrace; for such payments, if honorably made, are made from one's own means.⁵

Expenses incidental to a sale of assets, including, if proper, an auctioneer's bill, may be thus charged to an estate;⁶ and in certain sales a broker's services are well employed.⁷ Under some circumstances, the expense of an agent, collector, or bookkeeper, may be charged to a reasonable amount;⁸ though not as an extra charge, where the agent was needlessly employed to do what the representative might personally have done.⁹ Likewise, the cost of publishing citations, and other expenses attending the probate proceedings.¹⁰ Valuable

¹ *Reaves v. Garrett*, 34 Ala. 558; *Clayton v. Somers*, 27 N. J. Eq. 230. Usurious payments are unfavorably regarded, and yet they may be allowed in meritorious instances. *Coffee v. Ruffin*, 4 Coldw. 487. See 2 P. & H. (Va.) 124. The expense of keeping a horse which could not be sold may be allowable. 7 J. J. Marsh. 190.

² *Liddell v. McVickar*, 11 N. J. L. 44; *Mann v. Lawrence*, 3 Bradf. 424.

³ *Brackett v. Tillotson*, 4 N. H. 208; *Robbins v. Wolcott*, 27 Conn. 234. Losses occurring through his negligence in taking a refunding bond from distributees may render the representative liable. 8 B. Mon. 461.

⁴ *Billingslea v. Henry*, 20 Md. 282.

⁵ *Jones v. Ward*, 10 Yerg. 160.

⁶ *Pinckard v. Pinckard*, 24 Ala. 250.

This does not include liquors furnished at an auction, nor usually any refreshments to customers. *Griswold v. Chandler*, 5 N. H. 492.

⁷ See *Myrick Prob.* 86; *Tucker v. Tucker*, 29 N. J. Eq. 286.

⁸ *McWhorter v. Benson*, Hopk. 28; *Morrow v. Peyton*, 8 Leigh, 54; *Henderson v. Simmons*, 33 Ala. 291; 16 La. Ann. 256; 1 Harp. Ch. 224. And see 16 Abb. Pr. N. s. 457.

⁹ *Gwynn v. Dorsey*, 4 Gill & J. 453.

¹⁰ *Reynolds v. Reynolds*, 11 Ala. 1023. In American practice, a charge for clerical services is not generally allowed, though special circumstances may justify such charges. 3 Redf. 465; *Miles v. Peabody*, 64 Ga. 729. In England, clerk-hire, etc., is more naturally allowed, because the fiduciary can receive

services rendered in procuring assets, and even the services of a detective or other expert, or of some one employed to procure evidence or serve as a witness, where the service was needful or just.¹

Whether the executor or administrator can claim for traveling expenses to and from court, board and lodging, may depend upon custom and the special circumstances; and all expenses of this nature must have been reasonably and *bond fide* incurred in prosecuting the business of the estate;² but a collateral relative cannot charge the estate for offices properly gratuitous and kind, even though he be executor or administrator.³

An executor or administrator should not charge the estate for services rendered by him during his decedent's lifetime, of apparently a gratuitous character or recompensed by a legacy; nor upon any iniquitous claim.⁴ But for a *bond fide* debt due him by the decedent, he may claim allowance as creditor; all proper offsets being duly reckoned.⁵

§ 543. **Expenses of Education, Maintenance, etc.**— Expenses of education and maintenance devolve, usually, upon trustees under a will and guardians, rather than upon the fiduciary who administers and distributes the estate.⁶ An administrator cannot be credited, in his accounts, for board, clothing, or other necessities of his distributees;⁷ for such outlay, if matter of allowance at all, affects only the method of paying fully the share of an individual distributee, as if the representative advanced him money. But statute allowances to widows and young children stand on their own peculiar foot-

no personal compensation. See Perry Trusts, § 912.

¹ Lewis, *Re*, 35 N. J. Eq. 99; Greene v. Grimshaw, 11 Ill. 389.

² Disallowed in 3 Hayw. 123.

³ Lund v. Lund, 41 N. H. 355.

⁴ Egerton v. Egerton, 17 N. J. Eq. 419; *supra*, § 431; Pursel v. Pursel, 14 N. J. Eq. 514.

⁵ *Supra*, § 439. See further, Kerr v. Hill, 2 Desau. 279.

⁶ See Perry Trusts, 117, 612; Schoul. Dom. Rel. 3d ed. § 238.

⁷ Brewster v. Brewster, 8 Mass. 131; Trueman v. Tilden, 6 N. H. 201; Willis v. Willis, 9 Ala. 330; Sorin v. Olinger, 12 Ind. 29; 10 Sm. & M. 179; 8 Jones L. 111. Rent of a family pew, occupied by the family after the testator's death, follows this rule. Scott v. Monell, 1 Redf. 431.

ing;¹ and, as to executors, these may have the right and duty of applying sums for education and maintenance, in exceptional instances, under a testator's directions.²

Charges for the maintenance or education of the decedent himself are reckoned like other claims against an estate; and, while the representative's own charge in such connection invites scrutiny, it may, if proper, be allowed him.³

§ 544. **Allowance of Counsel Fees, Costs, etc.**—Executors or administrators who ask legal advice, employ counsel, or incur costs in litigation on behalf of the estate, may claim reasonable allowance for the same in their accounts.⁴ It is the duty of a representative to defend the estate against claims which he honestly, or upon reasonable grounds, believes to be unjust; and these expenses should be reimbursed, even though the suit be lost;⁵ and certainly, if the estate benefit by it. The principles are those discussed elsewhere; good faith and ordinary prudence on his part, in protecting the interests he represents, are all that may be exacted of him;⁶ and, in employing counsel, he incurs a personal liability, his lien on the assets serving for his own indemnity.⁷ With such reservations, the expenses of a litigation *bond fide* incurred, whether for procuring the probate of a will or one's appointment, or in the due course of administration, as in the pursuit of assets, or the resistance to creditors, or in asking instructions of the court, as also by way of accounting in compliance with the law and the terms of his bond, are allowed, with considerable indulgence, out of the assets, that a faithful representative may not personally suffer.⁸ These

¹ *Supra*, § 451; *Mead v. Byington*, 10 Vt. 116; 1 Har. & J. 227; *Simmons v. Boyd*, 49 Ga. 285.

² *Triggs v. Daniel*, 2 Bibb, 301; *Harris v. Foster*, 6 Ark. 388.

³ *Malony's Appeal*, 11 S. & R. 204; *Wall's Appeal*, 38 Penn. St. 464. And see 4 Redf. 380.

⁴ *Wms. Exrs.* 1860; *Macnamara v. Jones, Dick.* 587; 24 W. R. 979.

⁵ 32 Ala. 227; 6 Greenl. 48; 6 Allen,

494; 19 N. H. 205; 35 Miss. 540; 31 Penn. St. 311; 28 Vt. 765; 4 Redf. 302.

⁶ *Supra*, § 314.

⁷ *Supra*, § 256; *McHardy v. McHardy*, 7 Fla. 301.

⁸ *Wms. Exrs.* 376, 594, 1860, 1894; U. S. Digest, 1st series, *Executors and Administrators*, 3908-3935; cases *supra*; 33 Ala. 291; 8 Gill, 285. One may specially limit his liability by a contract that the attorney shall look to the

considerations apply to taxing court costs, or to the fees of attorneys and counsel in or out of court.¹

But bills for legal services, counsel fees, and the costs of litigation, are not to be allowed to the personal representative where the expense was not incurred in good faith, as calculated to promote the benefit of the estate.² Nor where, in instituting litigation or suffering it to proceed, or in managing the cause on his own part, the representative was culpably remiss in the performance of the duty confided to him.³ Nor where the expense was incurred by him, against the interests of the estate, and for his own express benefit;⁴ or because of his misconduct.⁵ Nor for services in connection with matters which lie outside the range of his official duty.⁶ Nor where, imprudently or dishonestly, he has incurred needless expenditure in the execution of his trust; employing legal services where none were required, or more counsel than was reasonably needful and proper, or settling extravagant fee bills without a prudent scrutiny.⁷ Costs or counsel fees are not usually to be credited on the repre-

estate alone for payment. 58 Md. 58. As to the liability of executors or administrators for costs, upon a non-suit or a verdict against them, see *Wms. Exrs.* 1894, 1897, 1980. Costs in suits asking directions under a will, etc., and in such other amicable litigation as may be justifiable under the particular circumstances, are usually allowed, at the court's discretion, out of the estate. *Wms. Exrs.* 376, 2034, 2038; *L. R.* 1 P. & D. 655; 1 Paige, 214; 31 N. J. Eq. 234. And to such awards probate and equity courts incline in their own formal practice. In probate causes, in some States, however (probate proceedings being conducted somewhat informally), it is not customary to allow costs to either party. 12 Allen, 17; 7 Gray, 472. And see 4 Redf. 1. Local practice usually determines the question of costs, independently of external jurisdictions.

Contingent fees, or fees beyond those taxable, may be consistent with local practice. 2 H. & M. 9; 29 Miss. 72.

But legal expenses, and the reasonable fees of attorneys or counsel employed in good faith, are thus allowable; not money paid out by way of a compromise. 33 Ala. 291. Each case must stand on its own merits as to allowing the executor or administrator for costs and fees in litigation. 9 Ala. 734. Allowances of this character are found regulated by local statute. *Seman v. Whitehead*, 78 N. Y. 306.

¹ 6 Thomp. & C. 211; 30 Ark. 520.

² *O'Neill v. O'Donnell*, 9 Ala. 734.

³ *Green v. Fagan*, 15 Ala. 335.

⁴ *Mims v. Mims*, 39 Ala. 716; *Stephens' Appeal*, 56 Penn. St. 409; *Cameron v. Cameron*, 15 Wis. 1.

⁵ 37 Ala. 683; 109 Mass. 541; 81 Penn. St. 263.

⁶ *Lusk v. Anderson*, 1 Met. 426; 2 Bibb, 609.

⁷ *Crowder v. Shackelford*, 35 Miss. 321; *Liddell v. McVickar*, 11 N. J. L. 44. And see *Smyley v. Reese*, 53 Ala. 89.

sentative's accounts, unless he has paid them.¹ And where an attorney performs services properly belonging to the representative himself, compensation for both cannot properly be allowed.

§ 545. **Compensation of Executors and Administrators.**—As to compensation, the long-established English rule of chancery has been, that a fiduciary office is honorary and gratuitous. Hence, the executor or administrator must serve without recompense for his own services, being strictly forbidden to make profit out of his office.²

American policy, on the other hand, binds the executor or administrator closely to the court in his official dealings; but renders the judicial proceedings as inexpensive as possible, and remunerates him for faithful services; holding him bound, in consequence, to fulfil his trust with a just sense of the legal obligations which it imposes. It discourages the idea of recompensing deputies liberally for duties which the representative may himself capably render. And, compensation being thus allowed, the legal liability is greater; and more stress is laid upon personal qualifications for the trust.

¹ *Thacher v. Dunham*, 5 Gray, 26; 40 Ala. 391, 421. As to allowing them directly to the attorney, see 12 W. Va. 427.

² *Perry Trusts*, §§ 432, 904; *Robinson v. Pett*, 3 P. Wms. 132; Wms. Exrs. 1853. A consequence not unnatural is, that the labors of the office with its responsibilities become shifted unduly, where the estate is a large and onerous one, upon solicitors, proctors, counsel, and officers of the court; so that the actual representative finds himself administering, not unfrequently, for the peculiar profit of those whom he must trust to lead him, unless he can keep the business out of the courts as non-contentious.

The English chancery rule, as to trustees, too, has been very strict, that trustees cannot derive direct or indirect profit from the estate they represent;

that they cannot be factors, experts, brokers, receivers, nor even make charges against the estate represented for professional services rendered, notwithstanding the professional or expert knowledge they may have brought to the discharge of the trust. *Perry Trusts*, §§ 132, 904. Even though trustees carry on a trade under the testator's direction, they can charge nothing for their services, notwithstanding the perilous risks they incur. *Perry Trusts*, § 906.

But it has been found necessary to allow compensation in British colonies in order to induce suitable men to accept the office; and probably with the modern development of wealth invested in personal securities, other exceptions will be conceded by the English Parliament. See as to trustees, *Perry Trusts*, § 904; and as to guardians, *Schoul. Dom. Rel.* § 375.

Compensation being now allowed to the personal representative in, perhaps, every State in this Union, upon maxims of sound policy which our most eminent equity jurists have inculcated,¹ it becomes matter of local custom or enactment what compensation shall be reasonable. In many States, a commission on the amounts received and paid out is allowed; an excellent basis for such a computation, and, perhaps, universally approved in this country, wherever a fiduciary's recompense is passed upon.² But as such a rule meets routine rather than extraordinary services, our later cases appear inclined to allow to an executor or administrator, besides the usual commission, a moderate charge for professional and personal services specially rendered by him, where such skill was needed and bestowed, and where he was capable of bestowing it.³ Such services are sometimes estimated by the

¹ "The policy of the law ought to be such as to induce honorable men, without a sacrifice of their private interests, to accept the office." 2 Story Eq. Jur. § 1268 *n.* And see *Boyd v. Hawkins*, 2 Dev. Eq. 334; *Perry Trusts*, § 917. But see Chancellor Kent in 1 Johns. Ch. 37, 534. Also the Delaware rule as applied in *State v. Platt*, 4 Harring. 154. American policy is in favor of granting remuneration. *Perry Trusts*, § 917; *Schoul. Dom. Rel.* § 375; *Barney v. Saunders*, 16 How. (U. S.) 542; *Clark v. Platt*, 30 Conn. 282; *Wms. Exrs.* 1853, Perkins's note. And it may also be said that while executors are selected by a decedent as matter of personal trust or confidence to administer, an administrator is appointed to perform duties without any such essential relation to the estate represented.

² The allowances made for the compensation of executors and other fiduciary officers varies in different States; but the local statutes on the subject are digested in *Perry Trusts*, § 918, and notes. In the larger number of States the compensation is by way of a commission, which may vary, according to circumstances, from one to ten per cent.,

which last is usually the maximum. The New York rule established is five per cent. on sums not exceeding one thousand dollars; half that amount upon all sums between that and five thousand dollars; and one per cent. on sums exceeding that amount. 3 Johns. Ch. 43. This rule practically obtains in other States as fixing on the whole a fair average rate. One-half the commission is for sums received, and the other half for sums disbursed. The New Jersey statute fixes a higher rate of commissions. *Perry Trusts*, § 918, note. And so is it in Ohio and various other States. *Ib.* See 28 La. Ann. 638; 11 Phila. (Pa.) 26, 39, 92; 2 Redf. 244, 255, 312, 465. Commissions on credits or a set-off, where a claim is adjusted, are not favored; that should rather be computed on the balance; and commissions on a debt owing by or to the representative himself should be disallowed. 85 Penn. St. 398; 38 Tex. 109.

³ *Wendell v. Wendell*, 19 N. H. 210; 11 Phila. 95. In New Hampshire and Maine, the court gives a *per diem* compensation for time, travel, labor, etc. *Perry Trusts*, § 918.

court in fixing the commission; but in most New England States, where the court is empowered to allow what is reasonable, specific sums may be charged for special services in addition to the usual commission, or in lieu thereof, provided the whole does not exceed a fair rate of compensation; and the court may vary the allowance according to circumstances.¹ Claims for special allowances should, however, always be closely scrutinized, as the representative here employs himself, so to speak; all items improper should be disallowed, and exorbitant amounts reduced.

Commissions and compensation may be forfeited by the representative's misconduct and culpable remissness in his trust.² And, if one has been appointed on a distinct under-

¹ Longley v. Hall, 11 Pick. 120; Emerson, Appellant, 32 Me. 159; Roach v. Jelks, 40 Miss. 754; Evarts v. Nason, 11 Vt. 122; Clark v. Platt, 30 Conn. 282.

A gross sum should not be charged generally for services, without some specification of particulars, 41 Ala. 267. But a gross sum is permitted to be charged in some States. Charging more than the statutory remuneration, for services to heirs, etc., is not permitted. 59 Mo. 585; 6 Rich. Eq. 2. As to the Illinois rule, which treats claims for professional service with disfavor, see Hough v. Harvey, 71 Ill. 72.

Where a will directs a six per cent. commission allowed upon "all moneys collected," this means "collections" merely, and does not embrace the entire estate. Ireland v. Corse, 67 N. Y. 343.

Real estate may be properly controlled by the representative and a commission allowed. Eshleman's Appeal, 74 Penn. St. 42. For the rule of commissions, where an incumbrance is discharged and applied to a claim, see 36 Tex. 116; 30 Ark. 520. And see, as to selling lands under a power, 24 Hun, 109; Twaddell's Appeal, 81 * Penn. St. 221. On a sale of real estate, a commission exceeding two and one-half per cent. is rarely allowable. 11 Phila. 53.

Commissions based on a constructive possession of assets, and not actual, are not favored. 51 Miss. 211; 30 Ark. 520.

As to an administrator *de bonis non* and his commissions, see Myrick Prob. 163. Special administrators are not usually entitled to full commissions. 41 Ala. 267; 67 Mo. 415. Co-executors or co-administrators are, as a rule, entitled to share the commissions equally. 4 Abb. App. Dec. 578; Squier v. Squier, 30 N. J. Eq. 627. But they may arrange with one another as to duties and compensation. See 4 Md. Ch. 368; 8 Md. 548. A public administrator who seeks an appointment, knowing that by law he is not entitled, can claim no recompense. 27 La. Ann. 574.

As to executors who are testamentary trustees, and their commissions, see 4 Redf. 34; 11 Phila. 80.

Concerning the time when commissions should be computed, see Drake v. Drake, 82 N. C. 443. One should not appropriate his commissions until they have been allowed; but he may retain funds to meet them. Wheelwright v. Wheelwright, 2 Redf. 501.

² Brown v. McCall, 3 Hill, 335; Hapgood v. Jennison, 2 Vt. 294; 3 Green, 51; Clauser's Estate, 84 Penn. St. 51. Neglect to render accounts until citation

standing with those interested to serve as executor or administrator without recompense, or at a stated compensation, he must abide by his engagement.¹

§ 546. **General Matters as to Charges and Allowances.**—A few points may here be added. An administration account, rendered in the probate court for settlement, is said to be in the nature of a declaration in a writ ; so that, unless amended by order of court, a greater sum than actually charged cannot be allowed to the representative, either in that court or upon appeal.² But, as to commissions and interest, the probate practice, in some States, is to omit such items when the accounts are presented, so as to allow them to be entered, or the amounts carried out, upon the hearing before the judge of probate.³ In making up a final account, items for subsequent expenditure may be specified by way of anticipating payment, and the balance struck accordingly.⁴

§ 547. **Accounts and Allowances, as to Foreign Assets.**—A foreign executor or administrator cannot be compelled to account, unless he has brought assets into the domestic jurisdiction ; nor then, necessarily, as one answerable to the local probate court and not rather in chancery, on general maxims.⁵ The expenses attending a sale of lands in a foreign jurisdiction, or the taxes paid on such real estate, are not properly allowed upon an administration account rendered in the domestic forum.⁶

does not necessarily forfeit commissions. Barcalow, *Re*, 29 N. J. Eq. 282. See 10 S. C. 208; 4 Redf. 34. One may forfeit commissions and yet be entitled to a reasonable recompense. 3 Green, 51.

¹ It is immaterial that such promise was not made with all parties interested. *Bate v. Bate*, 11 Bush, 639.

² *Pettingill v. Pettingill*, 64 Me. 350.

³ *Lund v. Lund*, 41 N. H. 355, 364.

⁴ See *Hone v. Lockman*, 4 Redf. 61, as to adding items of receipts and expenditures subsequent to filing the final account.

⁵ *Kohler v. Knapp*, 1 Bradf. (N. Y.) 241; *supra*, §§ 173-180.

⁶ 1 Root, 182; *Roberts v. Roberts*, 28 Miss. 152; *Jennison v. Hapgood*, 10 Pick. 77.

APPENDIX.

REMEDIES BY AND AGAINST EXECUTORS AND ADMINISTRATORS.

IN the course of the present volume we have touched upon all the usual remedies to be pursued by or against executors and administrators. As the reader has doubtless observed, English practice favors bringing all the assets of the estate, together with the personal representative, into the court of chancery; there to have the administration practically controlled and directed, unless the parties interested are satisfied that their rights will be duly respected by a settlement out of court;¹ while, according to the American system, chancery is seldom resorted to where the local probate jurisdiction is adequate, and the security chiefly relied upon by creditors, legatees, and other interested parties, is the probate bond, filed by the personal representative, which obliges him not only to administer properly, but to render regular accounts in the probate court besides.² It is the bill in equity upon which those interested in the estate who distrust the personal representative, or seek redress against his mismanagement, must chiefly rely, where an English estate is administered; but where the estate is American, a probate court affords chief protection, requiring, as it may, ample sureties to be furnished when such precautions appear desirable, and, in all cases of official delinquency, permitting the representative's bond to be prosecuted for the benefit of the interested parties.³ As to remedies of this nature, little need be added, except to refer the practitioner to general rules of practice, as laid down in all elementary works of equity or common law, with a further express reference to the codes of his own State, for copious details in which, as independent local courts expound such legislation, American jurisdictions by no means harmonize.

But, in both English and American practice, it frequently occurs that the personal representative should sue or be sued in a common-law court; and upon this topic there remains something to be said. Here, as already suggested to the reader more than once, the fundamental difficulty in our practice is, that in some instances the representative should sue or be sued in his official capacity, in others in his personal capacity; while, in an intermediate class of cases, there appears an option given for a suit in either capacity.⁴ The essential reason for this distinction is, that our law of administration regards the contract of an executor or administrator as binding himself individually, unless made under an express reservation

¹ *Supra*, §§ 518, 521.

² *Supra*, §§ 520, 522.

³ *Supra*, §§ 136, 139.

⁴ *Supra*, §§ 137, 140.

that only assets shall be resorted to; the real object being to allow assets to be strictly applied to claims in a regular course of administration, so that the personal representative may not create liens or preferences in favor of those with whom he deals. However commendable this rule, its application makes much difficulty in the courts; for an action, grounded in a good cause, may be thrown out because of some misconception in the plaintiff's mind as to how that cause originated, and in what capacity the representative should be made a party to the suit.¹ Let us trace the distinction into remedies by or against the personal representative.

(1) As to suits by the executor or administrator. Here the difficulty is the less, because of a liberal option which our law concedes. Where the cause of action originated in the time of the deceased, the representative sues in the *detinet* only, or in his representative capacity. But where the cause accrues after the death of the testator or intestate, the executor or administrator may sue as such or not at his option; and, whenever the fruits of the suit must be assets, he may sue in his representative character, though the cause originated in his own contract.² Even though he call himself "executor" or "administrator" in the action, if it appears that the cause of action is in his own right, the representative word may be stricken out as surplusage;³ and even matters of substance are aided after default or a verdict in his favor.⁴

(2) As to suits against the executor or administrator. It is here that the rigor of the common-law rule is more strongly manifested. Where a defendant is simply misdescribed as "executor" or "administrator," the descriptive word may be stricken out as surplusage, and a judgment rendered against him individually. But where he is sued as executor or administrator, and the whole pleadings show that conception of his liability, when he should have been sued as an individual, the variance is held fatal to the suit.⁵ For the judgment follows the complaint; and if the cause is maintained successfully against one in his representative character, the debt, damages, and costs are to be levied *de bonis decedentis*.⁶ The action cannot, strictly speaking, be converted into one against the defendant personally, if wrongly begun; nor can counts be joined as of causes originating against the deceased and against the representative; but, for a suit on the representative's own contract, the judgment is against him as an individual, or *de bonis propriis*.⁷ The practice in some States appears to change this rule, however, so as to give greater freedom in suing in the alternative, and adapting the judgment accordingly;⁸ and such modifications of the old doctrine appear highly desirable in the interests of justice.

¹ *Supra*, § 396.

² Wms. Exrs. 1871; *supra*, § 290.

³ Wms. Exrs. 1872.

⁴ *Ib.*

⁵ See Austin & Munro, 47 N. Y. 360, opinion of court; 5 East, 150.

⁶ 47 N. Y. 360; Smith v. Chapman, 93 U. S. Supr. 41; Wms. Exrs. 1937.

⁷ See Wms. Exrs. 1937-1939.

⁸ Wms. Exrs. 1937, Perkins's *n.*; Davis v. Vansands, 45 Conn. 600. But *cf.* 47 N. Y. 360.

We may add a few words as to common-law suits against the executor or administrator. When sued in his representative character, the defendant who intends to deny his being such, should specially plead *ne unques executor* or *ne unques administrator*.¹ But the proper plea, where he has not assets as representative, is *plene administravit*.² These pleas are sometimes artificially employed,³ but they are not necessarily false pleas. And, as observed in a recent case, unless the executor or administrator falsely pleads *plene administravit*, he is not liable to a judgment beyond assets in his hands to be administered.⁴ A full and lawful administration previous to such suit, or the utter want of assets to respond to the demand, is a good defence; and judgment *de bonis decedentis* is the only kind to which the plaintiff would be thus entitled. But, *devastavit* being averred and proved on the representative's part, or assets being shown to have existed which ought to be applied to the plaintiff's claim and which cannot be found, the court may order the judgment levied out of the representative's own proper goods.⁵

¹ Wms. Exrs. 1943.

² Wms. Exrs. 1953. If he has assets, but not enough, he pleads *plene administravit praeter*, etc.

³ *Supra*, § 187.

⁴ *Smith v. Chapman*, 93 U. S. Supr. 41.

⁵ *Ib.*; Wms. Exrs. 1975, 1987. When

an executor or administrator has committed a *devastavit*, there are two modes of proceeding to render him liable; the one by an action of debt on the judgment obtained against him, and the other by a *scire facias* founded thereon. 3 Head, 575; Wms. Exrs. 1984, 1987.

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NOTE. — In the foregoing table, the Roman numeral letters express the degrees of consanguinity by the civil law, and the Arabic figures at the bottom, those by the common or English canon law. See text, § 101.

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